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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 21

THE UNITED STATES OF AMERICA, PETITIONER

vs.

PATRICIA J. REYNOLDS, PHYLLIS BRAUNER AND ELIZABETH PALYA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 7, 1952

CERTIORARI GRANTED APRIL 7, 1952

SUPREME COURT OF THE UNITED STATES

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PATRICIA J. REYNOLDS, PHYLLIS BRAUNER AND ELIZABETH PALYA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX

215114—52——1

1a *Appendix to brief for appellant*

In the United States District Court for the Eastern District of Pennsylvania

Civil Action No. 9793

PHYLLIS BRAUNER AND ELIZABETH PALYA

v.

THE UNITED STATES OF AMERICA

Charles J. Biddle, Esq.
G. A. Gleeson, Esq.

Docket entries

Filed August 28, 1951

No. 10142

Index
No. 1949

1. June 21—Complaint filed.
   June 21—Summons exit.
2. July 5—Appearance of Gerald A. Gleeson, Esq., for defendant filed.
3. July 14—Summons returned "June 30, 1949, and served on Attorney General of the United States by registered mail and on June 22, 1949, served Gerald A. Gleeson, Esq., United States District Attorney, and filed.
4. Aug. 17—Stipulation of counsel extending time within which to file Answer to October 19, 1949, and Order of Court approving same filed. Noted 8/18/49.
5. Oct. 20—Stipulation of counsel extending time for filing Answer to December 18, 1949, and Order of Court approving same filed. 10/21/49 Noted.
6. Nov. 22—Answer filed.
7. Nov. 22—Order to place case on trial list filed.
8. Nov. 28—Plaintiff's interrogatories filed.

2a 9. Dec. 5—Stipulation of counsel extending time for filing answers to plaintiff's interrogatories to December 28, 1949, and Order of Court approving same filed. Noted 12/6/49.

10. Dec. 8—Motion for stipulation of counsel and Order of Court consolidating Civil Action #10142 with this case for trial filed. Noted 12/9/49.

11. Dec. 28—Stipulation of counsel extending time for filing answers to interrogatories to January 17, 1950, and Order of Court approving same, filed. 12/29/49 Noted.

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12. Jan. 5—Defendant's answer to interrogatories filed.
13. Jan. 18—Plaintiff's motion for production of documents, filed.
14. Jan. 18—Order to place case on Argument List, filed.
15. Jan. 25—Motion to quash order and motion for production of documents filed.
16. Feb. 15—Hearing sur plaintiff's motion for production of documents and sur defendant's motion to quash, etc. C. A. V.
17. June 30—Opinion, Kirkpatrick, J., denying defendant's motion to quash and granting plaintiff's motion to produce filed.
18. July 20—Order of Court permitting plaintiff to inspect certain documents, etc., and staying all proceedings until order is complied with or vacated. Noted and Notice mailed 7/21/50.
19. Aug. 30—Transcript of hearing on August 9, 1950, before Kirkpatrick, J. at Washington, D. C., filed.

3a 20. Sept. 21.—Amended Order re production and inspecting of documents, filed.

21. Oct. 10.—Defendant's Petition for rehearing on motion to quash Order and motion for production of documents, filed.
22. Oct. 10.—Claim of privilege by Secretary of the Air Force, filed.
23. Oct. 10.—Affidavit of Judge Advocate General, U. S. Air Force, filed.

Oct. 12.—Order of Court that facts be taken as established, filed. 10/13/50. Noted and Notice Mailed (#10142).

Nov. 27.—Trial (Kirkpatrick, J.) Witnesses sworn. C. A. V.

24. Dec. 11.—Transcript of testimony, filed.
25. Dec. 18.—Plaintiff's Requests for findings of fact, filed.
26. Dec. 18.—Plaintiff's Requests for conclusions of law, filed.

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27. Feb. 20.—Opinion, Kirkpatrick, J., granting judgment for plaintiff's requests for Findings of Fact and Conclusions of Law, filed.
28. Feb. 27.—Decree granting judgment in favor of plaintiffs in the sum of $80,000, each filed. Noted and Notice mailed 2/28/51.

Mar. 2.—Transcript of hearing of November 21, 1951 (In Chambers, K., J.), filed. (See #10142.)
29. Apr. 20.—Notice of appeal of defendant filed. (4/23/51 Copies to Chas. J. Biddle.)
30. Apr. 20.—Copy of Clerk's notice to U. S. Court of Appeals filed.

4a In United States District Court

PATRICIA J. REYNOLDS

v.

THE UNITED STATES OF AMERICA

Charles J. Biddle, Esq.
G. A. Gleeson, Esq.

Docket entries and index

Index No. 1949

1. Sept. 27.—Complaint filed.
Sept. 27.—Summons exit.
2. Nov. 9.—Summons returned "on September 28, 1949, served on Gerald A. Gleeson, Esq., and on October 10, 1949, served on the Attorney General by registered mail and filed.
3. Nov. 22.—Answer filed.
4. Nov. 22.—Order to place case on trial list, filed.
Dec. 8.—Motion for stipulation of counsel and Order of Court consolidating this case with civil action #9793 for trial filed (#9793). Noted 12/9/49.

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June 30.—Opinion, Kirkpatrick, J., denying defendant's motion to quash and granting plaintiff's motion to produce filed (#9793).
July 20.—Order of Court permitting plaintiff to inspect certain documents etc., and staying all other proceedings until order is complied with or vacated filed (#9793). Noted 7/21/50.
5a Aug. 30.—Transcript of hearing on August 9, 1950, before Kirkpatrick J. at Washington, D. C., filed. (See C. A. #9793.)
Sept. 21.—Amended order re inspection of documents, filed. (See C. A. #9793.)
5. Oct. 10.—Petition for rehearing on motion to quash order and motion for production of documents, filed.

6. Oct. 10.—Claim of Privilege by Secretary of Air Force, filed.
7. Oct. 10.—Affidavit of Judge Advocate General, U. S. Air Force, filed.
8. Oct. 12.—Order of Court that certain facts be taken as established, filed. 10/13/50 Noted and notice mailed.
Nov. 27.—Trial (Kirkpatrick, J.) Witnesses sworn. C. A. V.
Dec. 11.—Trianscript of testimony, filed (#9793).
9. Dec. 18.—Plaintiff's Requests for findings of fact, filed.
10. Dec. 18.—Plaintiff's requests for conclusions of law, filed.

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11. Feb. 20.—Opinion, Kirkpatrick, J., finding in favor of plaintiff, affirming certain plaintiff's requests for findings of fact and conclusions of law, filed.
12. Feb. 27.—Decree granting judgment in favor of plaintiff in the sum of $65,000,000.00 filed. Noted and Notice mailed 2/28/51.
13. Mar. 2.—Transcript of hearing of November 24, 1950 (In chambers K. J.) filed.
14. Apr. 20.—Notice of Appeal of defendant filed. (4/23/51 Copy to Chas J. Biddle.)
15. Apr. 20.—Copy of Clerk's notice to U. S. Court of Appeals, filed.

6a

In United States District Court

Civil Action No. 9793

Complaint

Filed June 21, 1949

Plaintiff Phyllis Brauner is a citizen of the United States residing at 10 Ridley Avenue, Aldan, Delaware County, Pennsylvania, in the Eastern District of Pennsylvania. Plaintiff Elizabeth Palya is a citizen of the United States residing at 16 Station Avenue, Haddon Heights, New Jersey. Plaintiffs bring suit against the United States of America and invoke the jurisdiction of this Court under Section 1346 (b) of Title 28, United States Code, upon the following causes of action:

FIRST CAUSE OF ACTION

1. The defendant herein is the United States of America. On or about October 6, 1948, defendant was the owner, operator and possessor of a certain B-29 airplane.

2. On and prior to said date, and at all times material hereto, the maintenance, supervision, control and operation of the said airplane was carried on by the officers and employees of defendant, while acting within the scope of their office and employment.

3. On and prior to said date, and at all times material hereto, William H. Brauner was a civilian research and development engineer employed by the Franklin Institute, Philadelphia, Pennsylvania.

4. In the course of his said employment, on said date, and under the supervision and control of defendant's officers and employees, the said William H. Brauner boarded and became a passenger on the said airplane, as a civilian observer, for the purpose of observing and testing the operation of certain confidential electronic equipment which was installed in the said airplane.

5. On said date, and while being operated by defendant's officer and employees, the said airplane took off from Macon, Georgia; shortly thereafter developed engine trouble; caught on fire; and crashed in the vicinity of Waycross, Georgia.

7a 6. The said William H. Brauner, as aforesaid, was a passenger on the said airplane and was killed as a result of the said accident.

7. The said accident and the death of the said William H. Brauner were caused solely and exclusively by the negligent and wrongful acts and omissions of the officers and employees of the defendant while acting within the scope of their office and employment, and were due in no manner whatsoever to any act or failure to act on the part of the said William H. Brauner.

8. The said William H. Brauner did not bring an action during his lifetime and no other action for his death has been commenced against the defendant, nor has any claim therefor been presented to any Federal agency.

9. The said William H. Brauner left surviving him the following persons: his wife, Phyllis Brauner, who is a plaintiff herein; a daughter Susan, aged four; and an after-born daughter Catherine, born February 12, 1949.

10. The Georgia Code, more particularly Title 105, Section 1301 et seq. therefore, provides that under such circumstances the defendant shall be liable to plaintiff for damages in an amount representing the full value of the life of the said William H. Brauner, which amount is hereby claimed.

Wherefore, plaintiff Phyllis Brauner claims of defendant the sum of Three hundred thousand Dollars ($300,000), or such larger amount to which this Honorable Court may determine she is legally entitled.

SECOND CAUSE OF ACTION

11. The allegations of paragraphs 1 and 2 are repeated.

12. On and prior to said date, and at all times material hereto, Albert Palya was a civilian research and development engineer employed by Radio Corporation of America, Camden, New Jersey.

13. In the course of his said employment, on said date, and under the supervision and control of defendant's officers and em-
8a ployees, the said Albert Palya boarded and became a passenger on the said airplane, as a civilian observer, for the purpose of observing and testing the operation of certain confidential electronic equipment which was installed in the said airplane.

14. The allegations of paragraph 5 are repeated.

15. The said Albert Palya, as aforesaid, was a passenger on the said airplane and was killed as a result of the said accident.

16. The said accident and the death of the said Albert Palya were caused solely and exclusively by the negligent and wrongful acts and omissions of the officers and employees of defendant while acting within the scope of their office and employment, and were due in no manner whatsoever to any act or failure to act on the part of the said Albert Palya.

17. The said Albert Palya did not bring an action during his lifetime and no other action for his death has been commenced against the defendant, nor has any claim therefor been presented to any Federal agency.

18. The said Albert Palya left surviving him the following persons: his wife, Elizabeth A. Palya, who is a plaintiff herein; a son Robert, aged nine; a son William, aged six; and a daughter Judith, seven weeks old.

19. The Georgia Code, more particularly Title 105, Section 1301 et seq. thereof provides that under such circumstances the defendant shall be liable to plaintiff for damages in an amount representing the full value of the life of the said Albert Palya which amount is hereby claimed.

Wherefore, plaintiff Elizabeth Palya claims of defendant the sum of Three hundred thousand Dollars ($300,000), or such larger amount to which this Honorable Court may determine she is legally entitled.

Hence this suit.

Respectfully submitted.

CHARLES J. BIDDLE,
117 South Seventeenth Street,
Philadelphia 3, Pa., Attorney for Plaintiffs.

9a

In United States District Court

Civil Action No. 9793

Answer

Filed November 22, 1949

An Now comes The United States of America, defendant herein, by its attorneys Gerald A. Gleeson, United States Attorney in and for the Eastern District of Pennsylvania, and Thomas J. Curtin, Assistant United States Attorney in and for said District, and makes answer to the complaint filed herein as follows:

FIRST CAUSE OF ACTION

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted.
5. Admitted.
6. Admitted.
7. Denied. Defendant avers that there was no negligent and wrongful acts and omissions on the part of any officers or employees of the defendant. The defendant was in no manner responsible for the accident.
8. Admitted.
9. Admitted.
10. Proof demanded.

Wherefore, defendant prays that the action be dismissed.

SECOND CAUSE OF ACTION

11. Admitted.
12. Admitted.
13. Admitted.
14. Admitted.
15. Admitted.
16. Denied. Defendant avers that there were no negligent and wrongful acts and omissions on the part of any officers or employees of the defendant. The defendant was in no manner responsible for the accident.
17. Admitted.
18. Admitted.
19. Proof demanded.

10a

Wherefore, defendant prays that the action be dismissed.

(S) GERALD A. GLEESON,
United States Attorney.

(S) THOMAS J. CURTIN,
Assistant United States Attorney.

In United States District Court

Civil Action No. 9793

Interrogatories propounded by plaintiffs for answer under Rule 33

Filed November 28, 1949

Phyllis Brauner and Elizabeth Palya, plaintiffs in the above action, by their attorney, Charles J. Biddle, Esquire, hereby make demand that defendant or its counsel answer the following interrogatories and submit copies of the records and documents requested, under or pursuant to Rule 33:

1. With reference to the crash of defendant's B–29 type aircraft near Waycross, Georgia, on October 6, 1948:

(a) Was an investigation (or investigations) into said crash made or directed to be made by defendant, its officers, employees, servants or appointees?

(b) If so, attach to your answer a copy of the reports and findings of such investigation (or investigations, if more than one).

2. With reference to the said B–29 type aircraft:

(a) Did defendant require that current aircraft maintenance records (formerly referred to as USAF Forms 1 and 1A be maintained?

(b) If so, attach complete copies of said records to your answer, covering the entire history of the aircraft.

3. With reference to the said B–29 type aircraft:

(a) Did defendant require that current flight engineering records (formerly referred to as USAF Forms 41B) be maintained?

(b) If so, attach complete copies of said records to your answer, covering the entire history of the aircraft.

4. With reference to the said B–29 type aircraft:

11a (a) Did defendant require that any other records or logs showing mechanical condition, maintenance of equipment, require and/or flight records of said aircraft be maintained?

(b) If so, attach complete copies of said records or logs to your answer, covering the entire history of the aircraft.

5. Has defendant obtained a statement or statements, either oral or written:

(a) Concerning the events leading up to the crash of said B–29 type aircraft?

(b) Concerning the mechanical condition of said aircraft immediately prior to the crash?

(c) Concerning the cause or probable cause (or causes) of said crash and the resultant loss of lives?

(d) Otherwise concerning the said crash in any way?

6. If the answer to any part of interrogatory number 5 is in the affirmative, attach to your answer a copy of each such statement (or in the case of an oral statement, a write-up of the same), and state:

(a) Name or names and present addresses of the person or persons from whom each of such statements was obtained.

(b) The name of the person taking each such statement, and the date taken.

7. Was any engine trouble experienced with the said B-29 type aircraft on October 6, 1948, prior to the crash?

8. If your answer to the preceding interrogatory is in the affirmative:

(a) At what altitude and at what time was such trouble first experienced?

(b) Describe in detail the trouble experienced.

9. (a) Did said aircraft, or any of its engines, catch on fire prior to the crash? If so, at what altitude, and at what time?

(b) If more than one fire occurred, give details, including altitude and time at which each fire started.

12a 10. What orders, if any, were issued to the civilian personnel in the said aircraft to adjust their parachutes and prepare to bail out? At what altitudes and at what times?

11. Was the order ever given to the civilian personnel to bail out of said aircraft: If so:

(a) At what altitude, at what time, and how was it given?

(b) Was the aircraft in normal flight at the time? If not, describe any abnormality.

12. Was the said aircraft equipped with an automatic pilot? If so:

(a) Was it functioning properly on October 6, 1948?

(b) When was this equipment first turned on?

(c) Was it operating at the time the order to bail out was given? If not, why not?

13. At what time did the said aircraft crash? At what altitude above sea level?

14. Was the said aircraft equipped with fire fighting equipment? If so:

(a) Was the said fire fighting equipment standard for said type of aircraft? If not, describe any difference.

(b) Did said equipment, if any, include equipment for smothering engine fires?

15. If your answer to the first part of interrogatory number 14 is in the affirmative:

(a) How recently before the crash had said equipment been tested?

(b) Was said equipment functioning properly immediately prior to the crash?

(c) Was said crash due in any way to a failure on the part of said equipment to function properly?

(d) If you have any report or reports as to failure of the fire fighting equipment of said aircraft, either at this time or previously, attach copies of the same?

16. On what date was said aircraft first placed in an operational status?

17. How many hours in flight had been logged on said aircraft (prior to the crash)?

13a 18. Had said aircraft been involved in any accident or accidents prior to October 6, 1948? If so, give details, and attach copies of official reports of investigation.

19. Did defendant have in force on October 6, 1948, any written standard regulations with reference to the operation of army aircraft, and the carrying of civilian personnel therein (sometimes referred to as Airforce Regulations)? If so, attach a complete copy of all such regulations.

20. (a) What was the name of the pilot of the said B–29 type aircraft, on October 6, 1948?

(b) Did defendant require that a log or record (formerly known as Form 5) of his flying experience be maintained?

(c) If so, attach a complete copy of said record.

21. (a) What was the name of the copilot of the said B–29 type aircraft, on October 6, 1948?

(b) Did defendant require that a log or record (formerly known as Form 5) of his flying experience be maintained?

(c) If so, attach a complete copy of said record.

22. (a) Was the said B–29 type aircraft fitted with emergency escape hatches?

(b) If so, give the size and location of each escape hatch.

(c) How many doors must be opened to escape from each escape hatch?

23. (a) What was the weight of the said B–29 type aicraft empty?

(b) What was its gross weight loaded, on October 6, 1948?

(c) What is the maximum gross weight allowable for such type of aircraft under normal conditions?

(d) Was there anything unusual about the distribution of weight or personnel in said aircraft, on October 6, 1948?

24. Do the engines in this type of aircraft tend to overheat when run at full power? If so:

14a (a) For what periods and at what times were the engines of this aircraft run at full power on October 6, 1948?

(b) Did the engines of this aircraft give any evidence of overheating on October 6, 1948? If so, give details, including time and temperatures.

25. (a) Was a radio log kept on said aircraft showing communications with other aircraft and with ground stations?

(b) If so, attach a copy of said radio log for October 6, 1948, to your answer.

26. (a) Was a radio log kept at the field at Macon of messages sent to and received from said aircraft on October 6, 1948?

(b) If so, attach to your answer a copy of such radio log.

27. (a) Did the pilot of said aircraft bail out of the aircraft with his parachute?

(b) If so, at what altitude above the ground?

28. (a) Did the copilot of said aircraft bail out of the aircraft with his parachute?

(b) If so, at what altitude above the ground.

29. Were any pictures taken of the wreckage by defendant after the crash? If so, attach copies.

30. During the three months immediately preceding the crash on October 6, 1948, was it necessary at any time to postpone a scheduled flight of the said B–29 type aircraft because of mechanical or engineering defects? If so, list the date or dates of such postponements, giving the defects causing each such postponement and the steps taken to remedy them.

31. (a) Have any modifications been prescribed by defendant for the engines in its B–29 type aircraft to prevent overheating of the engines and/or to reduce the fire hazard in the engines?

(b) If so, when were such modifications prescribed?

15a (c) If so, had any such modifications been carried out on the engines of the particular B–29 type aircraft involved in the instant case? Give details.

(S) CHAS. J. BIDDLE,
Counsel for Plaintiffs.

In United States District Court

Civil Action No. 9793

Answer to interrogatories propounded by plaintiffs for answer under Rule 33

Filed January 5, 1950

Comes Now the United States of America by its attorneys Gerald A. Gleeson, United States Attorney in and for the Eastern District of Pennsylvania, and Thomas J. Curtin, Assistant

United States Attorney in and for said District, and makes answer to the Interrogatories propounded by plaintiffs herein, as follows:

1. (a) Yes.

(b) This material is not produced as it is not within the scope of an interrogatory filed pursuant to Rule 33, Federal Rules of Civil Procedure, as amended.

16a 2. (a) Yes.

(b) Destroyed in crash.

3. Yes, see attached Exhibit "A."

4. Yes, see attached Exhibit "A."

5. (a) Yes.

(b) Yes.

(c) Yes.

(d) Yes.

6. This material is not produced as it is not within the scope of an interrogatory filed pursuant to Rule 33, Federal Rules of Procedure, as amended.

(a) Captain Herbert W. Moore, 1275A, Tyndall Air Force Base, Fla., S/Sgt. Walter J. Peny, AF 693025, Chatham Air Force Base, Fla., T/Sgt. Earl W. Murrhee, AF 14171471, MacDill Field, Fla., Eugene Mechlir, 52 Wesley Ave., Erlton, N. Y.

(b) Not applicable.

7. Yes, almost immediately before the crash.

8. (a) 18,500 feet altitude at approximately 1400 hours, e. s. t.

(b) At between 18,500 or 19,000 feet manfold pressure dropped to 23" on No. 1 engine.

(c) Thereafter engine No. 1 was feathered. Fire broke out which was extinguished.

9. (a) Yes, No. 1 engine of the aircraft caught fire at approximately 20,000 feet and approximately 1,405 hours eastern time.

(b) One fire occurred.

10. All personnel were instructed by the pilot to put their chutes on immediately after leveling off at 20,000 feet, and prior to the outbreak of the engine fire.

11. (a) (b) At the instant the gear was extended, and the bomb bay doors opened to facilitate parachuting from the aircraft, the aircraft fell into a violent spin, the centrifugal force probably made it difficult to bail out. Testimony does not indicate whether or not order was given.

17a 12. Yes.

(a) Yes.

(b) On the climb that day.

(c) The auto-pilot was not being used at the time of the accident. The pilot turned it off. The erratic action of the aircraft after the gear was extended and the bomb bay doors opened wo[illegible]

have precluded using the auto pilot to hold the aircraft while bailing out.

13. Aircraft crashed at approximately 1408 hours Eastern time at point about 500 feet above sea level.

14. Yes.

(a) Yes.

(b) Yes, it was equipped with carbon dioxide fire extinguisher system for smothering engine fire.

15. (a) On June 1948.

(b) Yes.

(c) No.

(d) Not applicable in view of 15 (a) (b) (c).

16. Aircraft was placed on operational status on 19 October 1945.

17. Said aircraft was logged 304 hours and ten minutes prior to the accident.

18. Said aircraft had never been involved in an accident prior to October 6, 1948.

19. Yes. See attached Exhibit "B."

20. (a) Pilot of said B-29 on October 6, 1948, was Captain Ralph W. Erwin.

(b) Yes.

(c) See Exhibit "C" attached.

21. (a) Name of the copilot of said B-29 on October 6, 1948, was Captain Herbert W. Moore, Jr.

(b) Yes.

(c) Form 5 is attached, marked Exhibit "D."

22. (a) Yes.

(b) See attached Exhibit "E."

(c) Two doors must be opened to get from the rear pressurized compartments, one door must be opened to get from front compartment.

18a 23. (a) Weight of said B-29 empty 69, 121.

(b) Gross weight, approximately but not exceeding 109,000 pounds on October 6, 1948.

(c) Under normal conditions gross weight allowable is 102,000 pounds.

(d) There was nothing unusual about the distribution of weight or personnel in said aircraft on 6 October 1948.

24. The engines of all aircraft tend to overheat including the B-29's, when run at full power.

(a) The engines of this aircraft were never run at full power on October 6, 1948. Only the prescribed take-off, climb and cruise power settings were used which never approached full power.

(b) The engine head temperatures on engine Nos. 1, 2 and 4 were high after take-off and manifold pressure was reduced to 40"

hg. The airspeed was kept at 195 and no further high head temperature was experienced. This engine reaction is not unusual for B–29 type of aircraft on climbs after a take-off.

25. (a) If one was kept it was destroyed in the aircraft crash.

(b) Answer as in 25 (a).

26. (a) A radio log was kept by the control tower at Robins Air Force Base of messages sent to and received by the said TB–29 for take-off instruction but the military airways logs are destroyed after one year and if there were any en route messages to any airways station from said aircraft they are no longer available.

(b) Copy of Air Base tower Radio log is attached. See Exhibit "F."

27. (a) Pilot did not appear to have bailed out. Body was found near wreckage, with no parachute attached.

(b) Not applicable, see 27 (a) above.

28. (a) Yes.

(b) Copilot of said aircraft bailed out at approximately 15,000 feet.

29. Yes, see attached Exhibit "G."

19a 30. No. Scheduled flight was postponed for mechanical and engineering defects for three months prior to October 6, 1948.

31. No.

(S) GERALD A. GLEESON,
United States Attorney.

(S) THOMAS J. CURTIN,
Assistant United States Attorney,
Attorneys for Defendant.

[*Duly sworn to by Thomas J. Curtin; jurat omitted in printing.*]

In United States District Court

Motion for production of documents under Rule 34

Filed January 18, 1950

Plaintiffs, Phyllis Brauner and Elizabeth Palya, by their attorney, Charles J. Biddle, Esquire, move the court for an order to compel defendant herein, United States of America, to produce and to permit plaintiffs to inspect and to copy each of the following documents:

(a) The report and findings of the official investigation of the crash of defendant's B–29 type aircraft near Waycross, Georgia, on October 6, 1948.

(b) The statement with reference to such crash of Captain Herbert W. Moore, 1279A.

(c) The statement with reference to such crash of Staff Sergeant Walter J. Peny, AF698025.

(d) The statement with reference to such crash of Technical Sergeant Earl W. Murrhee, AF14171471.

Defendant, the United States of America, has the posses-
20a sion, custody and control of each of the foregoing documents, and has refused to provide copies of same although requested to do so pursuant to interrogatories propounded by plaintiffs for answer under Rule 33. Each of said documents constitutes or contains evidence or information relevant and material to the action and necessary to the plaintiffs in preparation for trial of this action, as more fully shown in Exhibit A hereto attached.

(S) CHARLES J. BIDDLE,
117 South Seventeenth Street, Philadelphia 3, Pennsylvania, Attorney for Plaintiffs.

STATE OF ----------,
County of ----------, ss:

Elizabeth Palya, being first duly sworn, deposes and says:

1. That she is one of the plaintiffs herein.

2. That this action is brought to recover damages for the death of William H. Bräuner and Albert Palya, being respectively the husbands of the two plaintiffs herein and who lost their lives in the crash of defendant's B–29 type aircraft near Waycross, Georgia, on October 6, 1948.

3. That this action was commenced by filing complaint and service of summons on or about the twenty-first day of June 1949; that the defendant duly appeared and issue was joined by the service on the twenty-second day of November 1949, of defendant's answer.

4. That counsel for plaintiffs has endeavored to obtain copies of the said documents pursuant to interrogatories propounded under Rule 33, but that defendant has refused to provide copies of the same, stating that such material is not within the scope of interrogatories filed pursuant to Rule 33.

5. That none of the said documents are in the possession or under the control of deponent and she is wholly ignorant of their
precise contents; that each and every one of the aforesaid
21a documents are in the possession and under the control of the defendant; that a knowledge of the contents thereof is essential to a preparation of plaintiffs' case for trial; and that deponent knows of no way to obtain a knowledge of the contents of said documents or the cause of said accident except by obtaining an order compelling the defendant to make discovery thereof,

due to the fact that the said B–29 type aircraft was within the exclusive possession and control of defendant.

EXHIBIT A

6. That deponent has fully and fairly stated the case in this action to her counsel, Charles J. Biddle, Esquire, and that she has a good and meritorious cause of action herein and that all of said documents are material and necessary to the plaintiff to enable her counsel to prepare for trial and that she cannot safely proceed to trial without them as she is advised by her said counsel after such statement and verily believes.

7. That this application is made in good faith for the purpose stated and no other and that deponent intends to use each and every one of the aforesaid documents in preparation for or upon the trial.

Wherefore, your deponent respectfully applies to the court for an order requiring the defendant herein to produce and discover, or to give an inspection and copy of, or permission to take a copy of each and every one of the aforesaid documents, and to deposit each and every one of said documents in the office of the clerk of the court, or elsewhere as the court shall direct, where they shall remain subject to the examination of this deponent's attorney during the ordinary business hours for such a period as the court shall direct, and to permit deponent to take photostatic copies of any such documents as she shall require.

Sworn to and subscribed before me this 13th day of January 1950.

(S) ELIZABETH A. PALYA. [SEAL]
(S) WM. B. MANLOVE,
Notary Public.

My commission expires September 8, 1954.

In United States District Court

Motion to quash order and motion for production of documents under Rule 34

Filed January 25, 1950

22a Now comes the United States of America by its Attorneys Gerald A. Gleeson, United States Attorney in and for the Eastern District of Pennsylvania, and Thomas J. Curtin, Assistant United States Attorney in and for said District, and moves to quash the Order and Motion for Production of Documents under Rule 34 for the following reasons:

1. Report and findings of official investigation of air crash near Waycross, Georgia, are privileged documents, part of the executive files and declared confidential, pursuant to regulation promulgated under authority of Revised Statute 161 (5 U. S. Code 22).

2. Report and findings of the official investigation of air crash near Waycross, Georgia, are hearsay.

3. The statement made by Captain Herbert W. Moore is hearsay and if the same is desired plaintiffs could take his deposition.

4. The statement made by Staff Sergeant Walter J. Peny is hearsay, and if the same is desired plaintiffs could take his deposition.

5. The statement made by Technical Sergeant Earl W. Murrhee is hearsay, and if the same is desired plaintiffs could take his deposition.

Wherefore, it is respectfully that the Order be denied, and the Motion dismissed.

(S) GERALD A. GLEESON,
United States Attorney.
(S) THOMAS J. CURTIN,
Assistant United States Attorney.

In United States District Court

Opinion on motion for production of documents under Rule 34

Filed June 30, 1950

Before KIRKPATRICK, Ch. J.

These two actions, consolidated for trial, were brought under the Federal Tort Claims Act to recover damages for the deaths of the plaintiffs' husbands, civilian passengers in an Army B-29 which crashed at Waycross, Georgia, on October 6, 1948. The plaintiffs have moved, under Rule 34, for an order requir-
23a ing the production by the defendant of written statements of three witnesses, soldiers who were in the plane and escaped death by bailing out, and also the report and findings of the official investigation made by the defendant. The defendant opposes the granting of the motion on the grounds (1) as to all the documents, that the plaintiffs have not shown good cause for their production, (2) as to the report and findings of the investigation, that they are privileged. While the exact date does not appear, it is conceded that the statements were taken and the investigation conducted within a very short time after the accident. These suits were begun on June 21, 1949.

It is clear from the carefully worded order amending the opinion of the Court of Appeals in Alltmont vs. United States, 177

F. 2d 971, that the Court wanted to make sure that what was said in the original opinion would not be seized upon as support for the proposition that if a party seeking discovery gets the name and address of a witness he cannot, under any circumstances, get a statement which the witness has given. And the Court also carefully avoided ruling that even when the witnesses are accessible and can be examined without undue hardship and delay their statements are necessarily immune. The Court merely said that in such a case "it is quite possible" that the party seeking production of the statements may not be able to show good cause. The Alltmont case, supra, decided that copies of such statements cannot be obtained without a showing of good cause, by means of procedure under Rule 33. Where, as here, the motion is under Rule 34, the production of a statement may still be obtained provided good cause is shown. Whether, in the present case, good cause appears is, therefore, properly before this Court.

Preliminarily, it may be said that this is not the case of statements obtained by an attorney or of statements obtained by others under the attorney's direction or for the purpose of aiding the attorney in preparing for trial. Hickman vs. Taylor, 329 U. S. 495, dealt with statements secured directly by the attorney himself and the gist of the decision was that considerations of policy arising from the function of the lawyer in the adversary
24a procedure by which our courts administer justice require that in such case the party seeking discovery must show circumstances of an exceptional nature in order to establish good cause. In the Alltmont case, supra, the opinion of the Court of Appeals extends the doctrine of Hickman v. Taylor to cover statements obtained by others for the attorney in connection with his preparation for trial. As stated, the statements asked for in the present case fall into neither category.

Concededly, in determining what amounts to good cause under Rule 34, the trial court has a wide discretion. Every case presents its own particular problems and any attempt to establish rigid rules would seriously impair the flexibility and efficiency of the federal discovery procedure. With this in mind, the facts bearing on this motion as they appear from the record and from the statements of counsel at the argument will be examined.

The plaintiffs reside within a few miles of Philadelphia. The three witnesses whose names have been supplied are Army Air Force personnel stationed at three different Army air bases in Florida. The burden, expense and inconvenience to the plaintiffs involved in taking their depositions are factors for the Court to consider in exercising its discretion, though of themselves they do not necessarily establish good cause. It was suggested at the argument that the defendant might bring the witnesses to Philadelphia

or even pay the expenses of the Plaintiffs' attorney to Florida but I do not understand that any binding commitment to that effect has been made nor have I the power to order it under this motion to produce. I have received no intimation that the suggestion made by the government attorney would be approved or carried into effect by the Army Command.

However, assuming that it is possible to take the depositions of the witnesses in question without undue burden upon the plaintiffs, the fact remains that, in view of the nature of this particular case, disclosures of the contents of their written statements is necessary to enable the plaintiffs to properly prepare their cases for trial, and furnishes good cause for production.

25a The plaintiffs have no knowledge of why the accident happened. So far as such knowledge is obtainable, the defendant has it. When the airplane crashed, it was wrecked and much of the evidence of what occurred was destroyed. Only persons with long experience in investigating airplane disasters could hope to get at the real cause of the accident under such circumstances. The Air Force appointed a board of investigators immediately after the accident and examined the surviving witnesses while their recollections were fresh. With their statements as a starting point the board was able to make an extensive investigation of the accident. These statements and the report of the board's investigation undoubtedly contain facts, information, and clues which it might be extremely difficult, if not impossible, for the plaintiffs with their lack of technical resources to obtain merely by taking the depositions of the survivors.

I am not suggesting that the witnesses on deposition would not answer the question asked them truthfully but, in a case like this, in which seemingly trivial things may, to the expert, furnish important clues as to the cause of the accident, the plaintiffs must have accurate and precise first-hand information as to every relevant fact if they are to conduct their examination of witnesses properly and to get at the truth in preparing for trial. This only the statements can give them. I would not go so far as to say that the witnesses would necessarily be hostile. However, they are employees of the defendant, in military service and subject to military authority and it is not an unfair assumption that they will not be encouraged to disclose, voluntarily, any information which might fix responsibility upon the Air Force.

The answers to the interrogatories are far short of the full and complete disclosure of facts which the spirit of the rules requires. True, the defendant has produced a mass of documents but these refer to the past performance of the plane and service records of the pilots and are essentially negative. When it comes to the

interrogatory "Describe in detail the trouble experienced", the answer is, "At between 18,500 or 19,000 feet manifold pressure dropped to 23 inches on No. 1 engine." Obviously, the defendant, with the report and findings of its official investigation in its possession, knows more about the accident than this.

26a

Beside all this, the accident happened more than 18 months ago and what the crew would remember now might well differ in important matters from what they told their officers when the event was fresh in their minds. Even in simple accident cases requiring no technical knowledge to prepare for trial, the fact that a long period of time has elapsed between the accident and the taking of the deposition of a witness gives a certain unique value to a statement given by him immediately after the accident when the whole thing was fresh—particularly when given to an employer before any damage suit involving negligence has begun.

For these reasons I conclude that good cause appears for the production of all documents which are subject to the motion.

The immunity which the Government asserts for the report and findings of the official investigation, so far as it is based upon the express provision of the Statute (R. S. 161, 5 U. S. C. A. 22) and the rules and regulations of the Department of Justice, has been fully considered and held not sustainable by this Court in O'Neill vs. United States (the Alltmont case), 79 F. Supp. 827. Much of what was said in that case on the point is pertinent here and need not be repeated. And while the decision was reversed upon other grounds, the question of privilege was not dealt with by the Court of Appeals. The action in the Alltmont case, supra, was under the Suits in Admiralty Act but the provision of the Tort Claims Act, under which this action is brought, to the effect that the United States shall be liable "in the same manner" as a private individual, is the equivalent of "according to . . . the rules of practice obtaining in like cases between private parties" in the Suits in Admiralty Act. Wunderly v. United States, 8 F. R. D. 356.

Again, as in the Alltmont case, supra, the Government does not here contend that this is a case involving the well recognized common law privilege protecting state secrets or facts which might seriously harm the Government in its diplomatic relations, military operations or measures for national security.

27a

In effect, the Government claims a new kind of privilege. Its position is that the proceedings of boards of investigation of the armed services should be privileged, in order to allow the free and unhampered self-criticism within the service necessary to obtain maximum efficiency, fix responsibility and maintain proper

discipline. I can find no recognition in the law of the existence of such a privilege. Substantially, this same claim has been considered and rejected in at least two District Court cases, Bank Line Limited v. United States, 68 F. Supp. 587, 76 F. Supp. 801, and Cresmer v. United States, 9 F. R. D. 203. The first of these cases was under the Suits in Admiralty Act and the second under the Tort Claims Act, but the privilege claimed was the same in both. I agree with the results of these decisions and conclude that the report and findings in this case are not privileged.

The defendant's motion to quash is denied and the plaintiffs' motion to produce is granted.

In United States District Court

Petition for rehearing on motion to quash order and motion for production of documents under Rule 34

Filed October 10, 1950

Now comes the United States of America by its Attorneys Gerald A. Gleeson, United States Attorney in and for the Eastern District of Pennsylvania, and Thomas J. Curtin, Assistant United States Attorney in and for said District, and requests the court for rehearing on the above-entitled matter, for the following reasons:

1. That the order, entered pursuant to the opinion in this case, is contrary to law.

2. That the order, entered pursuant to the opinion in this case, is in violation of revised statute 161 (5 U. S. Code 22).

3. The plaintiffs have failed to show good cause sufficient to compel production of the documents sought under Rule 34 of the Federal Rules of Civil Procedure.

28a Wherefore, it is respectfully requested that the petition for rehearing be approved.

(S) GERALD A. GLEESON,
United States Attorney.
(S) THOMAS J. CURTIN,
Assistant United States Attorney.

In United States District Court

Claim of privilege by the Secretary of the Air Force

(Filed October 10, 1950

The plaintiffs have filed suits against the United States for the wrongful deaths of their husbands, who were killed in a mili-

tary aircraft while on a highly secret military mission, near Waycross, Georgia, on 6 October 1948. Counsel for the plaintiffs have applied to this court pursuant to Rule 34 of the Federal Rules of Civil Procedure for copies of the findings of the Board of Officers appointed to investigate the accident pursuant to Air Force Regulation No. 62–14 and statements of Air Force personnel witnesses.

With respect to the production of statements of witnesses interrogated by the Board sought by the plaintiffs' counsel, there has been no affidavit showing good cause; nor any showing of necessity for the production of this information. The defendant in fact has provided the plaintiffs with the names and known addresses of its witnesses. The names and addresses were furnished in answer to the plaintiffs' interrogatories.

With regard to the demand for the production of the Report of Investigation (Report of Major Aircraft Accident, AF Form 14) and any other ancillary report or statement pertaining to this investigation, the respondent-defendant, the United States, has objected and still objects to the production of this report on the grounds that it is privileged. The report of investigation (Report of Major Aircraft Accident, AF Form 14), together with all the statements of the witnesses, was prepared under regulations which are designed to insure the disclosure of all pertinent factors which may have caused, or which may have had a bearing on, the accident in order that every possible safeguard may be developed so that precautions may be taken for the prevention of future accidents and for the purpose of promoting the high-
29a est degree of flying safety. These reports are prepared for interdepartmental use only, with the view of correcting deficiencies found to have existed and with the view of taking necessary corrective measures or additional precautions based on the opinions and conclusions of the Board of Officers convened to investigate such accidents. The disclosure of statements made by witnesses and air-crewmen before Accident Investigation Boards would have a deterrent effect upon the much desired objective of encouraging uninhibited admissions in future inquiry proceedings instituted primarily in the interest of flying safety.

The defendant further objects to the production of this report, together with the statements of witnesses, for the reason that the aircraft in question, together with the personnel on board, were engaged in a highly secret mission of the Air Force. The airplane likewise carried confidential equipment on board and any disclosure of its mission or information concerning its operation or performance would be prejudicial to this Department and would not be in the public interest. The furnishing of such information to claimants or litigants against the Government is

not contemplated under the provisions of Air Force Regulation No. 62–14, and if such information is to be released it must be released as prescribed in Air Force Regulation No. 112–2, paragraph 6; Air Force Regulation No. 112–2, paragraph 20; Army Regulation No. 410–5; and Army Regulation No. 420–5, 32 CFR 836.7 (by Joint Army-Air Force Regulation No. 1–1–60, dated 11 May 1949, the Air Force has adopted all pertinent Army Regulations that have not been superseded by Air Force Regulations).

The issue presented is solely whether reports of Boards of Investigation and statements of witnesses which are concerned with secret and confidential missions and equipment of the Air Force, declared confidential and privileged by law and Department regulations, and which are the work-product of the Department of the Air Force, are privileged and their production is beyond judicial authority in this litigation.

It has been the historic position of the executive branch of the Government that executive files and investigative reports are confidential and privileged and that their disclosure would not
30a be in the public interest. President Washington in 1796 refused to furnish the instructions to the U. S. Minister concerning the Jay Treaty.

President Jefferson in 1807 refused to furnish confidential letters relative to the Burr conspiracy.

President Monroe in 1825 refused to furnish document relating to the conduct of naval officers in the Pacific.

President Jackson in 1833 refused to furnish a paper read by him to the heads of departments relating to the removal of bank deposits.

President Tyler in 1842 refused to furnish the names of the Congressmen who applied for office, and in 1843 refused to furnish a War Department report on alleged Indian frauds.

President Polk in 1846 refused to furnish evidence of payments made by the State Department on President's certificates.

President Fillmore in 1852 refused to furnish information on a proposal by the King of the Sandwich Islands to transfer the islands to the United States.

President Lincoln in 1861 refused to furnish Major Anderson's dispatches relative to the defense of Fort Sumter.

President Grant in 1876 refused to furnish information concerning executive acts performed away from the Capitol.

President Hayes in 1877 refused to permit the Secretary of the Treasury to produce papers concerning the nomination of Theodore Roosevelt as Collector of the Port of New York.

President Cleveland in 1886 refused to produce documents relating to suspension and removal of Federal Officials.

President Theodore Roosevelt in 1909 refused to produce documents of the Bureau of Corporations.

President Coolidge in 1924 refused to produce a list of companies in which Secretary of the Treasury Mellon was interested.

President Hoover in 1930 refused to produce the letters leading up to the London Naval Treaty; and in 1932 refused to produce documents concerning a Treasury Department investigation.

31a President Franklin D. Roosevelt in 1941 refused to permit the Director, F. B. I., to produce F. B. I. reports; in 1943 he refused to permit the Director, Bureau of the Budget, to produce the files and correspondence of that Bureau relative to the transfer of the F. C. C.'s functions; also refused to permit the Chairman of the Board of War Communications and the Secretary of War to produce their files in the matter; and in 1944 refused to permit the Director, F. B. I., to produce reports of that agency.

President Truman in 1947 refused to permit the Civil Service Commission to produce records concerning applicants for positions; and in 1948 refused to permit disclosure of F. B. I. reports used in the Employees Loyalty Investigation.

The position of the executive branch of the Government and of this Department is restated in the opinion of the Attorney General Jackson of April 30, 1941, 40 Op. Atty. Gen. No. 8. That opinion pointed to the following injurious results: (1) disclosure would seriously prejudice law enforcement; (2) disclosure would prejudice the national defense; (3) disclosure would seriously prejudice the future usefulness of the Federal Bureau of Investigation for keeping of faith with confidential informants is an indispensable condition of future efficiency; and (4) disclosure might also result in the grossest kind of injustice to innocent individuals because the reports include leads and suspicions and sometimes even the statements of malicious or misinformed people.

This position is historically approved and authorized by authority of R. S. 161, 5 U. S. C. 22, and Air Force Regulations issued pursuant thereto, including Air Force Regulations Nos. 205–1, 112–2, 62–14, and Army Regulations Nos. 410–5 and 420–5 (by Joint Army-Air Force Regulation No. 1–11–60, dated 11 May 1949, the Air Force has adopted all pertinent Army Regulations that have not been superseded by Air Force Regulations). It may therefore be seen, the position taken by the Air Force in respect to the production of the documents in question has been

affirmed time and time again by the courts: Boske v. Comingore, 177 U. S. 459 (1900); Ex parte Sackett, 74 F. (2d) 922
32a (C. C. A. 9th, 1935); United States v. Potts, 57 F. Supp. 204 (M. D. Pa., 1944); U. S. ex rel. Bayarsky v. Brooks, 51 F. Supp. 974 (D. N. J., 1943); Harwood v. McMurtry, 22 F. Supp. 572 (W. D. Ky., 1938); Federal Life Ins. Co. v. Tolod, 30 F. Supp. 713 (M. D. Pa., 1940); Walling as W. & H. Adm. v. Comet Carriers, 3 F. R. D. 442 (S. D. N. Y., 1944); Young v. Terminal Ry., 70 F. Supp. 106 (E. D. Mo., 1947); see In re Lamberton, 124 F. 446 (W. D. Ark., 1903); Stegall v. Thurman, 175 F. 813 (N. D. Ga., 1910); Brent v. Hagner, 5 Cranch C. C. 71, Fed. Cas. No. 1,839 (C. C. D. C., 1836); (1853) 6 Op. Atty. Gen. 7; (1877) 15 Op. Atty. Gen. 342; (1905) 25 Op. Atty. Gen. 326; (1941) 40 Op. Atty. Gen. No. 8.

For the reasons stated above, I consider that the compulsory production of the Reports of Investigation conducted by the Board of Officers convened under the provisions of Air Force Regulation No. 62–14 and other pertinent regulations in connection with aircraft accidents is prejudicial to the efficient operation of the Department of the Air Force, is not in the public interest, and is inconsistent with national security. Accordingly, pursuant to the authority vested in me as head of the Department of the Air Force, I assert the privileged status of reports here involved and must respectfully decline to permit their production.

(S) THOMAS K. FINLETTER,
Secretary of the Air Force.

In United States District Court

Affidavit of the Secretary of the Air Force

The Secretary of the Air Force is the head of the Department of the Air Force, Public Law 216, Chap. 412, 81st Congress, 1st Session, Section 5 (4), reads in part:

"The Departments of the Army, Navy, and Air Force shall be separately administered by their respective Secretaries under the direction, authority, and control of the Secretary of Defense."

The meaning of the words "separately administered" is best exemplified by the following remark made by the Honorable
33a Carl Vinson, Chairman of the House Committee on Armed Services, during the full committee hearing on S. 1843, on June 28, 1949:

"Well, they are separately administered under the direction, authority, and control of the Secretary of National Defense. They are not all administered from the Secretary's office. The laws today confer certain rights on the various secretaries. They are to

carry out all those laws under the direction, authority, and control of the Secretary. Otherwise the Secretary would sit up in his office and try to run the whole establishment, and he couldn't do that because it is too large. So he has to let these Secretaries run their Departments separately from each other and separately from him, except that everything is under him. He is the authority in control of the carrying out of what he authorizes to be done." (Senate Committee of Armed Services Hearings on the National Security Act Amendments of 1949 on S. 1269 and S. 1843, p. 2869, 81st Cong., 1st Sess. See also Sen. Rept. 366, 81st Cong., 1st Sess.; H. Rept. 1064, 81st Cong., 1st Sess.; Conf. Rept. 1142, 81st Cong., 1st Sess.)

As head of the Department of the Air Force, the Secretary has exercised authority under the provisions of R. S. 161, 5 U. S. C. 22, the act of March 1, 1875, 10 U. S. C. 16, and as representative of the President in the exercise of his regulatory powers in respect to the Air Force of the United States, to promulgate regulations for the administration of the Department. Pursuant to the above authority, the Secretary has promulgated certain Air Force Regulations and has adopted certain Army Regulations in respect to the preservation, conservation, and release of departmental records:

Army Regulation 410–5, sections III and IV.
Army Regulation 420–5.
Air Force Regulation 62–14,
Air Force Regulation 112–2.
Air Force Regulation 205–1, 32 C. F. R. 805.
Joint Army-Air Force Regulation 1–11–60.
Air Force Regulation 5–9.

34a Army Regulations Nos. 410–5 and 420–5, pertaining to the release of information and reports in connection with litigation, are presently in effect in the Department of the Air Force, and for that reason the Department of the Air Force has not published similar regulations which would supersede the existing Army Regulations.

(S) THOMAS K. FINLETTER,
Secretary of the Air Force.

COUNTY OF ARLINGTON,
State of Virginia, ss:

Subscribed and sworn to before me this eighth day of August 1950.

[SEAL] (S) A. F. SPADA,
Notary Public.

My Commission expires 14 September 1952.

In United States District Court

Affidavit of the Judge Advocate General, United States Air Force

Filed October 10, 1950

Reginald C. Harmon, Major General, USAF, Serial Number 721A, The Judge Advocate General, United States Air Force, who being first duly sworn, deposes and says:

That as The Judge Advocate General, United States Air Force, he is responsible for the furnishing of material and the appearance of witnesses from among the military personnel of the United States Air Force in all matters where the United States Air Force is interested and in particular the above-styled suit.

That the following personnel of the Air Force are the only surviving military witnesses to the aircraft accident that occurred on October 6, 1948, approximately two miles south of Waycross, Georgia, in which aircraft type TB-29 (Serial Number 45-21866) was completely destroyed, and in which plaintiffs' decedents were killed:

"Captain Herbert W. Moore, 1279A, Tyndall Air Force Base, Florida.

35a "Staff Sergeant Walter J. Peny, AF 6980255, Chatham Air Force Base, Florida.

"Technical Sergeant Earl W. Murrhee, AF 14171471, MacDill Air Force Base, Florida."

That the aforementioned three witnesses will be made available at the expense of the United States for interrogation by the plaintiffs at a place and time to be designated by the plaintiffs,

That these witnesses will be authorized to testify regarding all matters pertaining to the cause of the accident except as to facts and matters of a classified nature,

That these witnesses will be authorized to refresh their memories by reference to any statements made by them before Aircraft Accident Investigating Boards or Investigating Officers, as well as other pertinent and material records that are in the possession of the United States Air Force,

That upon demand by the plaintiff all records, other than those which have been classified or determined to be privileged, have already been made available by the Air Force,

That such information and findings of the Accident Investigation Board and statements which have been demanded by the plaintiffs cannot be furnished without seriously hampering national security, flying safety and the development of highly technical and secret military equipment,

And That the disclosure of statements made by witnesses before Accident Investigation Boards would have a deterrent effect

upon the much desired objective of encouraging uninhibited admissions in future inquiry proceedings instituted primarily in the interest of flying safety.

(S) REGINALD C. HARMON,
Major General, USAF.

Subscribed and sworn to before me this seventh day of August 1950.

In United States District Court

Amended order re production and inspection of documents

September 21, 1950

36a A rehearing on plaintiffs' Motion for Production of Documents under Rule 34 was held on August 9, 1950, at the request of defendant, the United States of America. Pursuant to claim of privileged advanced by defendant at said rehearing, the Order for production of documents entered on July 20, 1950, is hereby amended to read as follows:

"Order that defendant, the United States of America, its agents and attorneys, produce for examination by this court the below-listed documents, so that this court may determine whether or not all or any parts of such documents contain matters of a confidential nature, discovery of which would violate the Government's privilege against disclosure of matters involving the national or public interest.

"(a) The report and findings of the official investigation of the crash of defendant's B-29 type aircraft near Waycross, Georgia, on October 6, 1948.

"(b) The statement with reference to such crash of Captain Herbert W. Moore, 1279A.

"(c) The statement with reference to such crash of Staff Sergeant Walter J. Peny, AF 698025.

"(d) The statement with reference to such crash of Technical Sergeant Earl W. Murrhee, AF14171471."

And it is further ordered that the said examination be held at United States Courthouse, Room 2096, in the City of Philadelphia, Commonwealth of Pennsylvania, on the 4th day of October, 1950, at 2 o'clock, P.M.

And it is further ordered that defendant, the United States of America, its agents and attorneys, thereafter permit plaintiffs and their attorneys to inspect the said documents and make copies of the same, with the exception of any part or parts of the said documents which may have been determined by this court to be privileged from discovery.

(S) KIRKPATRICK, *J.*

37a In United States District Court

Order that facts be taken as established

Filed October 12, 1950

Defendant having failed to comply with the order of this court dated September 21, 1950, requiring defendant to produce certain documents at Room 2096, United States Courthouse, Philadelphia, Pennsylvania, on October 4, 1950, for discovery purposes; and it appearing that the said documents are in the possession and control of defendant, that there was no sufficient excuse for defendant's failure to produce the same.

It Is Ordered that the following facts be taken as established for the purposes of this action, that plaintiffs need produce no further proof with respect to said facts, and that defendant will not be permitted to introduce evidence controverting said facts:

1. The deaths of William H. Brauner, Albert Palya and Robert E. Reynolds occurred as the result of the crash near Waycross, Georgia, on October 6, 1948, of a B-29 airplane owned and operated by defendant, United States of America.

2. The said crash and the resulting deaths of the aforesaid persons were caused solely and exclusively by the negligence and wrongful acts and omissions of the officers and employees of defendant while acting within the scope of their office and employment.

(S) KIRKPATRICK, *Ch. J.*

OCTOBER 12, 1950.

In United States District Court

Opinion on pleadings and proof

Filed February 20, 1951

Before KIRKPATRICK, Ch. J.

I affirm the plaintiffs' requests for findings of fact Nos. 1, 2, 3, 4, 5, 8, and 9. I also find as follows: The full value of the life of William Brauner as of the date of his death is $80,000. The full value of the life of Albert Palya as of the date of his death is $80,000.

I affirm the plaintiffs' first two requests for conclusions of law. I affirm the third conclusion of law to the extent that the gross sum each decedent would have earned to the end of his life had he not been killed, reduced to present cash value, is a proper factor to be considered in arriving at a sum which would fairly and justly compensate each plaintiff for her loss.

38a See the opinion filed this day in the case of Patricia J. Reynolds v. United States of America, Civil Action No. 10142.

In United States District Court

Civil Action No. 10142

Opinion on pleadings and proof

Filed February 20, 1951

Before KIRKPATRICK, Ch. J.

In this case, in which the plaintiff sued under the Federal Tort Claims Act to recover damages for the death of her husband, judgment has been entered for the plaintiff and damages are now to be awarded.

Concededly, the law of Georgia, where the fatal accident occurred, is binding upon the Court in respect of the measure of damages, unless it is in conflict with the Federal Tort Claims Act (28 U. S. C., Sec. 2674). The Georgia statute provides that a widow may recover from one negligently causing the death of her husband "the full value of the life of the decedent, as shown by the evidence" which the statute defines as "the full value of the life of the decedent without deduction where necessary for other personal expenses of the decedent had he lived."

The Federal Tort Claims Act, after making the United States liable in tort claims to the same extent as a private individual under like circumstances, provides that it shall not be liable for punitive damages. The Act then says "If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof." The defendant contends that this supersedes the Georgia statute and that, inasmuch as the plaintiff produced no evidence of what it cost the decedent to live and what part of his salary he customarily kept for his personal expenses, the evidence is insufficient to allow the Court to make a finding of the
39a widow's "pecuniary injuries," with the result that the Court cannot make an award of damages in any amount. Unless the Georgia statute provides or has been construed to provide for damages "only" punitive in nature, the defendant's position cannot be sustained.

The defendant bases its argument upon a discussion of the origin and general nature of legislation providing a remedy for

wrongful death, which appears in several opinions of the Supreme Court of Georgia, particularly Savannah Electric Co. v. Bell, 124 Ga. 663, and Pollard v. Kent, 59 Ga. App. 118. These opinions say that the Georgia death statute is "punitive so far as the defendant is concerned," but it is clear that what was meant was that, as in all death statutes, beginning with Lord Campbell's Act, the imposition upon a wrongdoer of civil liability for causing the death of another was to some extent a punitive concept. The Georgia Court makes it quite clear that the damages to be awarded to the plaintiff pursuant to the liability created by the statute, as distinguished from the liability itself, are not punitive damages by any definition. The same opinions declare them to be "compensatory" so far as the plaintiff is concerned.

The fact is that while the theory of the Georgia statute, like that of similar legislation elsewhere, may be described as punitive, the damages which it awards to a widow are entirely compensatory. Admittedly, the widow may, under the statute, recover more than the actual amount of money which she has lost by reason of her husband's death, but the restitution of expected support from her husband rarely compensates a widow fully for his death. It takes no account of the various intangible items of injury such as emotional distress, loss of consortium, companionship, services, advice and guidance. The measure set up by the Georgia statute for "full" value of the life of the decedent, permitting the widow to recover for all these items as well as her actual out-of-pocket loss, may well be intended as an approximation, arbitrary perhaps, but nonetheless legitimate.

That the Federal Tort Claims Act (28 U. S. C. Sec. 2674)
40a was not intended to apply to a statute like that of Georgia becomes quite plain when the legislative history of the Section and the Amendment is considered. At the time of its enactment there were two states, Alabama and Massachusetts, in which the damages were, beyond question "only" punitive. Thus, under the Alabama statute the age and life expectancy of the deceased, his physical and mental condition and earning capacity are all immaterial. Louisville & Nashville R. R. Co. v. Tegner, 125 Ala. 593, 698. In that state as in Massachusetts the recovery for a wrongful death is determined solely by reference to the character of the wrongful act and the degree of the wrongdoer's culpability. The committee report shows that it was this measure of damage which Congress intended to eliminate in death cases under the Tort Claims Act.

There is ample evidence in the case from which the "full value" of the life of this decedent within the meaning of the Georgia statute can be ascertained. In Pollard v. Kent, supra, the Georgia Court said, "* * * 'The actual facts and circumstances of each

case should guide the jury in estimating for themselves, in the light of their own observation and experience and to the satisfaction of their own consciences, the amount which would fairly and justly compensate the plaintiff for his loss.'"

I have examined and considered the calculations submitted by the plaintiff in support of her claim. They are relevant, but even though uncontradicted, are not binding upon the Court. In ascertaining damages in a death case the Court's task is not limited to adding together a number of mathematically ascertained elements. The problem is to find a sum which in the judgment of the Court or jury will fairly and justly compensate the widow for her loss. All the elements made relevant by the controlling law should be taken into consideration, but the final award must come from an exercise of judgment by the trier of fact.

With these principles in mind, I affirm the first five of the plaintiff's requests for findings of fact. I also find as follows: The full value of the life of Robert E. Reynolds as of the date of his death is $65,000.

I affirm the plaintiff's first two requests for conclusions of law.

I affirm the third conclusion of law to the extent that the
41a gross sum the decedent would have earned to the end of his life had he not been killed, reduced to its present cash value, is a proper factor to be considered in arriving at a sum which would fairly and justly compensate the plaintiff for her loss.

In United States District Court

Civil Action No. 9793

Decree

Filed February 27, 1951

An order having been entered by Judge Kirkpatrick on October 12, 1950, in the above-entitled action, establishing as a fact that the deaths of William H. Brauner and Albert Palya were caused solely and exclusively by the negligence and wrongful acts and omissions of the officers and employees of defendant while acting within the scope of their office and employment;

And the issue of damages in the above-entitled action having been duly tried before Judge Kirkpatrick on November 27, 1950, and both sides having been heard by counsel and an opinion having been filed on February 20, 1951, finding that the full value of the life of William H. Brauner as of the date of his death is $80,000; and finding that the full value of the life of Albert Palya is $80,000.

Now February 27, 1951, on motion of Charles J. Biddle, Esquire, counsel for plaintiffs, it is duly ordered that judgment be entered in favor of the plaintiff Phyllis Brauner and against the defendant, United States of America, in the sum of $80,000, and that judgment be entered in favor of the plaintiff Elizabeth Palya and against the defendant, United States of America, in the sum of $80,000.

(S) KIRKPATRICK, *Ch. J.*

In United States District Court.

Civil Action No. 10142

Decree

Filed February 27, 1951

An order having been entered by Judge Kirkpatrick on October 12, 1950, in the above-entitled action, establishing as a fact that the death of Robert E. Reynolds was caused solely and exclusively by the negligence and wrongful acts and omis-
42a sions of the officers and employees of defendant while acting within the scope of their office and employment;

And the issue of damages in the above-entitled action having been duly tried before Judge Kirkpatrick on November 27, 1950, and both sides having been heard by counsel and an opinion having been filed on February 20, 1951, finding that the full value of the life of Robert E. Reynolds as of the date of his death is $65,000.

Now February 27, 1951, on motion of Charles J. Biddle, Esquire, counsel for plaintiff, it is duly ordered that judgment be entered in favor of the plaintiff, Patricia J. Reynolds, and against the defendant, United States of America, in the sum of $65,000.

(S) KIRKPATRICK, *Ch. J.*

Received & Filed, June 21, 1951, IDA O. CRESKOFF, *Clerk*

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10,483.

PATRICIA J. REYNOLDS

v.

UNITED STATES OF AMERICA

Motion to Consolidate for Briefing and Trial Purposes and Motion for Extension of time in Which to File Appellant's Brief

AND NOW comes Gerald A. Gleeson, United States Attorney in and for the Eastern District of Pennsylvania, and Thomas J. Curtin, Assistant United States Attorney in and for said District, and respectfully shows the Court as follows:

1. The above case and that of PHYLLIS BRAUNER and ELIZABETH PALYA, No. 10484, were consolidated for trial purposes in the District Court and were tried as one case; and three judgments were entered thereon.

2. Two records on appeal were sent up to the United States Court of Appeals for the Third Circuit, being United States Court of Appeals Nos. 10483 and 10484.

3. The three cases grew out of the same aeroplane accident, and for conservation of time and money should be argued and briefed as one case on appeal.

4. The defendant-appellant, UNITED STATES OF AMERICA, has raised inter alia certain statutory questions herein which revolve around a bar order of the trial court upon the defendant UNITED STATES OF AMERICA's refusal to produce certain documents for inspection upon Plaintiff's Motion for Discovery.

5. The Brief of Appellant in this matter is being prepared in Washington by the joint efforts of the Solicitor General, the Attorney General of the United States, and the Judge Advocate General of the United States Army Air Force.

6. In view of the importance of the questions involved in this appeal; the approaching Summer Season; and the vacation and manpower problems, it is respectfully requested that the time for filing Appellant's Brief in the above entitled case be extended to August 27, 1951; inasmuch as counsel for the appellee has refused

to sign a stipulation extending the time, and has been notified of this Motion and served with a copy thereof.

GERALD A. GLEESON,
United States Attorney.

THOMAS J. CURTIN,
Assistant United States Attorney
Attorneys for Appellant.

Received & Filed, June 21, 1951, IDA O. CRESKOFF, *Clerk*

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10,484

PHYLLIS BRAUNER and ELIZABETH PALYA

v.

UNITED STATES OF AMERICA

Motion to Consolidate for Briefing and Trial Purposes and Motion for Extension of time in Which to File Appellant's Brief

AND NOW comes Gerald A. Gleeson, United States Attorney in and for the Eastern District of Pennsylvania, and Thomas J. Curtin, Assistant United States Attorney in and for said District, and respectfully shows the Court as follows:

1. The above case and that of PATRICIA J. REYNOLDS, No. 10483, were consolidated for trial purposes in the District Court and were tried as one case; and three judgments were entered thereon.

2. Two records on appeal were sent up to the United States Court of Appeals for the Third Circuit, being United States Court of Appeals Nos. 10483 and 10484.

3. The three cases grew out of the same aeroplane accident, and for conservation of time and money should be argued and briefed as one case on appeal.

4. The defendant-appellant, UNITED STATES OF AMERICA, has raised inter alia certain statutory questions herein which revolve around a bar order of the trial court upon the defendant UNITED STATES OF AMERICA's refusal to produce certain documents for inspection upon Plaintiff's Motion for Discovery.

5. The Brief of Appellant in this matter is being prepared in Washington by the joint efforts of the Solicitor General, the Attorney General of the United States, and the Judge Advocate General of the United States Army Air Force.

6. In view of the importance of the questions involved in this appeal; the approaching Summer Season; and the vacation and manpower problems, it is respectfully requested that the time for filing Appellant's Brief in the above entitled case be extended to August 27, 1951; inasmuch as counsel for the appellee has refused

to sign a stipulation extending the time, and has been notified of this Motion and served with a copy thereof.

GERALD A. GLEESON,
Gerald A. Gleeson,
United States Attorney.

THOMAS J. CURTIN,
Thomas J. Curtin,
Assistant United States Attorney
Attorneys for Appellant.

Received & Filed, June 22, 1951, IDA O. CRESKOFF, *Clerk*

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10,483

PATRICIA J. REYNOLDS

v.

UNITED STATES OF AMERICA

Answer to Motion for Extension of Time in Which to File Appellant's Brief

AND NOW, June 22, 1951, come CHARLES J. BIDDLE, Esquire and FRANCIS HOPKINSON, Esquire, attorneys for Appellee in the above cause, and make Answer to the Petition filed on behalf of Appellant, UNITED STATES OF AMERICA, as follows:

1. Admitted.

2. Admitted, except that the number of this appeal is 10,483 and not 10,484 as stated.

3. Admitted.

4. Admitted.

5 and 6. Appellee has no knowledge as to the facts averred in paragraph 5, but submits that the same are immaterial. The Bar Order of the Trial Court upon the Appellant, for its refusal to produce certain documents for inspection upon Appellee's Motion for Discovery (referred to in paragraph 4 of the Petition), which is the basis of this appeal, was entered October 12, 1950, so that the Appellant has already had eight months within which to prepare its brief upon questions appealed from. The final judgment pursuant to the trial in the Court below was entered approximately four months ago, on February 27, 1951.

This case involved a claim for damages for the death of the appellee's husband on October 6, 1948, after which date Appellee was left without means of support other than the small amount received under the Workmen's Compensation Law. It is therefore of great importance to Appellee that this Appeal be promptly heard. If the time for filing Appellant's brief should be extended to August 27, 1951 as requested in its Petition, counsel for Appellee would be required under the rules of your Honorable Court to file their brief within twenty days thereafter, which is exactly the period during which both counsel for Appellee have made all arrangements to be absent on their respective vacations. It would

therefore be necessary for counsel for Appellee to request additional time within which to file their brief on behalf of the Appellee. The result would be that the disposition of this Appeal would be substantially delayed.

It is respectfully suggested that if counsel for Appellant should be directed to file their brief not later than July 16, 1951, counsel for the Appellee would then have an opportunity to prepare their brief within the period allowed by the rules of Court, and the Appeal could then be heard without delay at the Fall Term of your Honorable Court.

WHEREFORE, it is respectfully requested that the time for filing Appellant's brief be fixed at not later than July 16, 1951.

CHAS. J. BIDDLE,
Charles J. Biddle,

FRANCIS HOPKINSON,
Francis Hopkinson,
Attorneys for Appellee.

June 22, 1951.

Received & Filed, June 22, 1951, IDA O. CRESKOFF, *Clerk*

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10,484

PHYLLIS BRAUNER and ELIZABETH PALYA

v.

UNITED STATES OF AMERICA

Answer to Motion for Extension of Time in Which to File Appellant's Brief

Date: June 22, 1951.

AND NOW, June 22, 1951, come CHARLES J. BIDDLE, Esq. and FRANCIS HOPKINSON, Esq., attorneys for the Appellees in the above cause and make answer to the Petition filed on behalf of the Appellant, UNITED STATES OF AMERICA, as follows:

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted.

5 and 6. Appellees have no knowledge as to the facts averred in paragraph 5, but submit that the same are immaterial. The Bar Order of the Trial Court upon the Appellant, for its refusal to produce certain documents for inspection upon Appellee's Motion for Discovery (referred to in paragraph 4 of the Petition), which is the basis of this appeal, was entered October 12, 1950, so that the Appellant has already had eight months within which to prepare its brief upon questions appealed from. The final judgment pursuant to the trial in the Court below was entered approximately four months ago, on February 27, 1951.

This case involved a claim for damages for the death of the Appellees' husbands on October 6, 1948, after which date Appellees and their minor children were left without means of support other than the small amount received under the Workmen's Compensation Law. It is therefore of great importance to Appellees that this Appeal be promptly heard. If the time for filing Appellants' brief should be extended to August 27, 1951 as requested in its Petition, counsel for Appellees would be required under the rules of your Honorable Court to file their brief within twenty days thereafter, which is exactly the period during which both counsel

for Appellees have made all arrangements to be absent on their respective vacations. It would therefore be necessary for counsel for Appellees to request additional time within which to file their brief on behalf of the Appellees. The result would be that the Appeal would be substantially delayed.

It is respectfully suggested that if counsel for Appellant should be directed to file their brief not later than July 16, 1951, counsel for the Appellees would then have an opportunity to prepare and file their brief within the period allowed by the rules of court and that the Appeal could then be heard without delay at the Fall Term of your Honorable Court.

WHEREFORE, it is respectfully requested that the time for filing Appellants' brief be fixed at not later than July 16, 1951.

CHAS. J. BIDDLE,
/s/ FRANCIS HOPKINSON,
Attorneys for Appellees.

Date: June 22, 1951.

Received & Filed, June 29, 1951, IDA O. CRESKOFF, *Clerk*

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10,483

PATRICIA J. REYNOLDS

v.

UNITED STATES OF AMERICA, *Appellant*

No. 10,484

PHYLLIS BRAUNER and ELIZABETH PALYA

v.

UNITED STATES OF AMERICA, *Appellant*

Order

Upon consideration of the motion of the appellant in the above entitled cases and of the answer in opposition thereto: It is ORDERED that:

1. The appeals be and they hereby are consolidated for briefing and oral argument
2. The time for filing the appellant's brief be and it hereby is extended to August 27, 1951
3. The time for filing the appellees' brief be and it hereby is extended to October 8, 1951
4. The above entitled cases be listed for oral argument during the week commencing October 15, 1951.

BIGGS,
Chief Judge.

June 29, 1951

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10,483

PATRICIA J. REYNOLDS

v.

UNITED STATES OF AMERICA, *Appellant*

No. 10,484

PHYLLIS BRAUNER AND ELIZABETH PALYA

v.

UNITED STATES OF AMERICA, *Appellant*

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued October 19, 1951
Before MARIS, GOODRICH and KALODNER, *Circuit Judges.*

Opinion of The Court

(Filed December 11, 1951)

By MARIS, *Circuit Judge.*

On October 6, 1948, a United States Air Force B-29 bomber, enroute from Robbins Air Force Base on a flight to Orlando, Florida, and return, crashed at Waycross, Georgia. The plane, carrying nine crew members and four civilian observers, had taken off for the purpose of an experimental testing of secret electronics equipment. Of the thirteen persons on board, nine were killed, including six members of the crew and three civilian observers who were engineer employees of private organizations involved in the research and development of the electronics equipment being tested. These consolidated suits under the Federal Tort Claims Act were thereafter instituted in the United States District Court

for the Eastern District of Pennsylvania by the widows of the three deceased civilian employees, each seeking damages for the alleged wrongful deaths of the deceased.

3 Subsequent to the filing of answers making general denials, detailed interrogatories pursuant to Civil Procedure Rule 33 were served on the United States Attorney by the plaintiffs. One of the interrogatories requested that a copy of any investigation report of the accident be attached to the answer. Another similarly sought copies of statements of witnesses which might have been obtained in connection with the accident. In answering the interrogatories the United States declined to comply with those questions which required the production of documents on the ground that such production was not within the scope of Rule 33.

Following the filing of these answers, plaintiffs made a motion under Civil Procedure Rule 34 for production of the official investigation report prepared by officers of the Air Force and the statements of the surviving crew members taken in connection with that investigation. To show good cause the motion and supporting affidavits stated that those documents constituted or contained information and evidence necessary in preparation for trial, that the documents were in the possession and control of the United States and that plaintiffs knew no way to obtain knowledge of their contents or the cause of the accident other than by their production.

On June 30, 1950 the district court sustained plaintiffs' motions to produce, holding that good cause had been shown therefor. 10 F.R.D. 468. After deciding the matter of good cause, the district judge disposed of the question as to the privileged status of the departmental records involved by reference to the views which he had expressed in O'Neill v. United States, 1948, 79 F. Supp. 827. An order requiring production was entered on July 20, 1950.

The Attorney General, upon being notified of the result reached by the district judge, notified the Department of the Air Force. On July 24, 1950 a letter from the Secretary of the Air Force to the district court stated:

> "Acting under the authority of Section 161 of the Revised Statutes (5 U.S.C. 22), it has been determined that it would not be in the public interest to furnish this report of investigation as requested by counsel in this case. This report was prepared under regulations which are designed to insure the collection of all pertinent information regarding aircraft accidents in order that all possible measures will be developed for the prevention of accidents and the optimum promotion of flying safety. Because this matter is one of such primary importance to the Air Force, it has been found necessary to restrict the use of aircraft accident reports to the official purpose for which they are intended. Under our regulations,

this type of report is not available in courts-martial proceedings or other forms of disciplinary action or in the determination of pecuniary liability.

"It is hoped that the extreme importance which the Department of the Air Force places upon the confidential nature of its official aircraft accident reports will be fully appreciated and understood by your Honorable Court."

Thereafter the district judge suggested that a hearing might be held so that this aspect of the case might be further considered. Accordingly a hearing was held by agreement in Washington, D.C., on August 9, 1950. At this hearing the district judge received a formal "claim of privilege" by the Secretary of the Air Force, setting forth the basis for the claim and the authority for the privilege, supported by his affidavit showing his right to promulgate regulations under Sec. 161, R.S., and the Act of March 1, 1875, 10 U.S.C. § 16, as head of the Department of the Air Force and describing the applicable regulations. In addition, an affidavit by the Judge Advocate General of the Air Force was filed which set forth the names and addresses of the survivors, undertook to make these witnesses available for interrogation at plaintiffs' will and at Government expense, and guaranteed to authorize the witnesses to testify to all matters pertaining to the cause of the accident except as to "classified" material. Further, the affidavit of the Judge Advocate General, after averring that all records, other than those classified or privileged, had already been made available to plaintiffs, specifically stated that the investigation board report and survivors' statements could not be furnished without seriously hampering national security, flying safety, and the development of highly technical and secret military equipment.

An amended order was issued by the district judge on September 21, 1950, to the effect that the United States should produce for examination by the court the documents in question, so that the court could determine whether the disclosure "would violate the Government's privilege against disclosure of matters involving the national or public interest." Compliance with this order was not forthcoming and, on October 12, 1950, the district judge issued an order, under Civil Procedure Rule 37, that the facts in plaintiffs' favor on the issue of negligence be taken as established and prohibiting the defendant from introducing evidence to controvert those facts. Subsequently, a hearing was held on the question of damages and judgment was entered for the plaintiffs on February 27, 1951. These appeals by the United States followed.

The appeals now before us raise a number of important and difficult questions for our determination. The first is whether the district judge erred in his ruling that the plaintiffs had shown

good cause under Rule 34 for the production of the statements of witnesses and investigation report which they sought to have produced for their inspection and copying. In concluding that good cause had been shown, the district judge said (10 F.R.D. 468, 470-471):

"The plaintiffs have no knowledge of why the accident happened. So far as such knowledge is obtainable, the defendant has it. When the airplane crashed, it was wrecked and much of the evidence of what occurred was destroyed. Only persons with long experience in investigating airplane disasters could hope to get at the real cause of the accident under such circumstances. The Air Force appointed a board of investigators immediately after the accident and examined the surviving witnesses while their recollections were fresh. With their statements as a starting point the board was able to make an extensive investigation of the accident. These statements and the report of the board's investigation undoubtedly contain facts, information and clues which it might be extremely difficult, if not impossible, for the plaintiffs with their lack of technical resources to obtain merely by taking the depositions of the survivors.

"I am not suggesting that the witnesses on deposition would not answer the questions asked them truthfully but, in a case like this, in which seemingly trivial things may, to the expert, furnish important clues as to the cause of the accident, the plaintiffs must have accurate and precise firsthand information as to every relevant fact, if they are to conduct their examination of witnesses properly and to get at the truth in preparing for trial. This only the statements can give them. I would not go so far as to say that the witnesses would necessarily be hostile. However, they are employees of the defendant, in military service and subject to military authority and it is not an unfair assumption that they will not be encouraged to disclose, voluntarily, any information which might fix responsibility upon the Air Force.

"The answers to the interrogatories are far short of the full and complete disclosure of facts which the spirit of the rules requires. True, the defendant has produced a mass of documents but these refer to the past performance of the plane and service records of the pilots and are essentially negative. When it comes to the interrogatory 'Describe in detail the trouble experienced', the answer is, 'At between 18,500 or 19,000 feet manifold pressure dropped to 23 inches on No. one engine'. Obviously, the defendant, with the report and findings of its official investigation in its possession, knows more about the accident than this.

"Beside all this, the accident happened more than 18 months ago and what the crew would remember now might well differ in important matters from what they told their officers when the event was fresh in their minds. Even in simple accident cases requiring no technical knowledge to prepare for trial, the fact that a long period of time has elapsed between the accident and the taking of the deposition of a witness gives a certain unique value to a statement given by him immediately after the accident when the whole thing was fresh—particularly when given to an employer before any damage suit involving negligence has begun."

We cannot say that in reaching his conclusion that good cause had been shown the district judge erred. The question, as we suggested in Alltmont v. United States, 1950, 177 F. 2d 971, 978, in every such case is whether special circumstances make it essential to the preparation of the party's case to see and copy the documents sought. In appraising for this purpose the circumstances of a particular case, the district court is necessarily vested with a wide discretion. Where, as here, the instrumentality involved in an accident was within the exclusive possession and control of the defendant so that it was as a practical matter virtually impossible for the plaintiffs to have made any independent investigation of the cause of the accident, considerations of justice may well demand that the plaintiffs should have had access to the facts, thus within the exclusive control of their opponent, upon which they were required to rely to establish their right of recovery. We agree with the district judge that it is not, under the circumstances of these cases, a sufficient answer to say that since the names of the witnesses whose statements were sought had been supplied in answer to the interrogatories, their depositions might have been taken by the plaintiffs. Obviously, this is no answer at all to their demand for the production of the investigation report. And under the circumstances here disclosed, as the district judge has cogently pointed out, it may well have been of vital importance to the plaintiffs to have knowledge of the contents of the statements made by the survivors immediately after the crash even though their depositions could also have been taken.

The Government's next contention is that even if it is held that good cause was shown by the plaintiffs for the production of the statements and report in question it was error to require their production because they were privileged. The Government points out that Rule 34 only authorizes the court to order the production of documents which are, in the language of the rule, "not privileged."

The Government's claim of privilege is based primarily on Section 161 of the Revised Statutes.[1] The primary contention is that this section in giving to the Secretary of the Air Force authority to prescribe regulations for the custody and use of the records and papers of his Department necessarily confers upon him full discretionary power in the public interest to refuse to produce any such records for examination and use in a judicial proceeding and that such records thereby become "privileged". The doctrine of separation of powers of the executive and judicial departments of the Government which is embodied in the Constitution is said to place the exercise of this discretionary power by the Secretary wholly beyond judicial review. In passing upon the validity, as applied to these cases, of this contention by the Government that it cannot be compelled to produce any records of the Department of the Air Force which the Secretary of that Department deems it not to be in the public interest to produce, it is necessary to consider the precise setting in which the contention is made.

In the first place it is clear that the validity of the regulations promulgated by the Secretary of the Air Force and his predecessor, the Secretary of War, with respect to the custody and production of papers and records of the Department is not in issue. For these regulations specifically provide that responsibility for the release of reports of boards of officers, special accident reports, or extracts therefrom regarding aircraft accidents to persons outside the authorized chain of command or administration, rests solely with the Secretary of the Air Force.[2] And since here the order to produce was directed to the United States as defendant, its execution, if lawfully demandable, obviously became the duty of the Secretary of the Air Force, the head of that department of the Government of the United States having custody of the records in question, who has full authority under the statute and the regulations to make such production. It is for this reason that the cases of Boske v. Comingore, 1900, 177 U.S. 459, and Touhy v. Ragen, 1951, 340 U.S. 462, both of which involved the refusal of a subordinate employee of a governmental department to produce records without the approval of his department head, are not in point.

Also it will be observed that we are not called upon to decide whether the Government's contention is available as a defense against the enforcement of the desired discovery through a subpoena duces tecum directed to the Secretary or a contempt proceeding against him for failure to obey it. Such a case would in-

[1] "Sec. 161. The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use and preservation of the records, papers, and property appertaining to it." 5 U.S.C.A. § 22.

[2] AF Regulation, No. 62-7, December 17, 1947, paragraph 6.

deed, as the Government argues, raise difficult constitutional questions arising out of the separation of powers under our Constitution.[3] Here no such action against any officer of the executive branch of the Government has been asked for or taken. We are concerned in these cases merely with ascertaining the legal duty of the Secretary under the Federal Tort Claims Act to make the requested discovery in order that we may determine whether his refusal to do so justified the order made by the district court under Civil Procedure Rule 37(b)(2) that the negligence of the United States be taken as established. And, finally, we do not have to determine the validity of the Government's contention as applied to a demand for the production of documents in a suit between private parties.[4] For here the United States is the party defendant against which these suits have been brought pursuant to the express authority of the Federal Tort Claims Act.

The Federal Tort Claims Act provides that "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances."[5] Thus by the express terms of the Act Congress has divested the United States of its normal sovereign immunity to the extent of making it liable in actions such as those now before us in the same manner as if it were a private individual. Moreover it has made the Federal Rules of Civil Procedure, including their discovery provisions, applicable to such actions against the United States.[6] We think that by so doing Congress has withdrawn the right of the executive departments of the Government in tort claims cases, even if under other circumstances such right exists,[7] to determine without judicial review the extent of the privilege against disclosure of Government documents sought to be produced for use in the litigation.

We come then to consider the propriety of the Government's claim of privilege in these cases. The principal basis of the Government's claim of immunity was set forth in the letter of the Secretary of the Air Force to the district judge dated July 24, 1950, from which we have already quoted. In that letter the Secretary stated that he had determined that it would not be in the public interest to furnish the documents requested. The basis which he stated for this determination was that it is necessary to restrict the use of aircraft accident reports so as to insure the collection of

[3] Compare Thompson v. German Valley R. Co., 1871, 22 N.J.Eq. 111; Appeal of Hartranft, 1877, 85 Pa. 433.

[4] Compare Marbury v. Madison, 1803, 5 U.S. 137, 144; Gray v. Pentland, 1815, 2 S. & R. (Pa.) 23.

[5] 28 U.S.C. § 2674.

[6] United States v. Yellow Cab Co., 1951, 340 U.S. 543, 553; United States v. General Motors Corporation, D.C.N.D.Ill. 1942, 2 F.R.D. 528, 530.

[7] But see 8 Wigmore on Evidence, 3d Ed. § 2379; Berger and Krash, Government Immunity from Discovery, 1950, 59 Yale L.J. 1451.

all pertinent information regarding aircraft accidents in order that all possible measures will be developed for the prevention of accidents and the optimum promotion of flying safety in the Air Force. The position of the Secretary in this regard is restated in the formal claim of privilege filed on August 9, 1950, as follows:

> "With regard to the demand for the production of the Report of Investigation (Report of Major Aircraft Accident, AF Form 14) and any other ancillary report or statement pertaining to this investigation, the respondent-defendant, the United States, has objected and still objects to the production of this report on the ground that it is privileged. The report of investigation (Report of Major Aircraft Accident, AF Form 14), together with all the statements of the witnesses, was prepared under regulations which are designed to insure the disclosure of all pertinent factors which may have caused, or which may have had a bearing on, the accident in order that every possible safeguard may be developed so that precautions may be taken for the prevention of future accidents and for the purpose of promoting the highest degree of flying safety. These statements are obtained in confidence, and these reports are prepared for intra-departmental use only, with the view of correcting deficiencies found to have existed and with the view of taking necessary corrective measures or additional precautions based on the opinions and conclusions of the Board of Officers convened to investigate such accidents. The disclosure of statements made by witnesses and air-crewmen before Accident Investigation Boards would have a deterrent effect upon the much desired objective of encouraging uninhibited statements in future inquiry proceedings instituted primarily in the interest of flying safety."

It will be seen that the privilege thus claimed is a broad one against any disclosure of the results of what the Government has aptly called its "housekeeping" investigations.[8] In support of its claim of privilege the Government points to paragraph 2 of Air Force Regulation No. 62-7 which contains the following provision:

> "Aircraft accident information is procured from reports of personnel who have waived their rights under the 24th Article of War in the interest of accident prevention upon the assurance that the reports will not be used in any manner in connection with any investigation or proceeding toward disciplinary action, determination of pecuniary liability, or line-of-duty status or reclassification."

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[8] Bank Line v. United States, D.C.S.D.N.Y. 1948, 76 F. Supp. 801, 803.

It seems clear to us, however, that this regulation has no bearing on the problem before us since it merely imposes restrictions upon the subsequent use within the Department for disciplinary and other purposes of statements of Air Force personnel with respect to aircraft accidents.

It may be conceded that in addition to the privilege against divulging state secrets, to which we shall later advert, there is also a less clearly defined privilege against disclosing official information if such disclosure will actually be harmful to the interests of the nation.[9] But we do not think that in the present cases brought under the Federal Tort Claims Act the Department of the Air Force is entitled to the absolute "housekeeping" privilege which it asserts against disclosing any statements of reports relating to this airplane accident regardless of their contents.[10] It may well be more convenient and efficient in the conduct of accident investigations for the Department not to be required to disclose statements and reports of this character. But the same would be true in the case of any private person and the latter do not ordinarily enjoy that privilege. Where, as here, the United States has consented to be sued as a private person, whatever public interest there may be in avoiding any disclosure of accident reports in order to promote accident prevention must yield to what Congress evidently regarded as the greater public interest involved in seeing that justice is done to persons injured by governmental operations whom it has authorized to enforce their claims by suit against the United States.[11] When Congress has desired to bar the admission of airplane accident reports in evidence it has known how to do so[12] and it has also known how to give to department heads discretionary power to refuse to produce records in suits brought against the

[9] As we shall point out later in this opinion this privilege was fully protected by the district judge in his amended order in these cases.

[10] See 8 Wigmore on Evidence, 3d Ed., § 2378a; Berger and Krash, Government Immunity from Discovery, 1950, 59 Yale L.J. 1451.

[11] Bank Line v. United States, D.C.S.D.N.Y. 1948, 76 F. Supp. 801; Cresmer v. United States, D.C.E.D.N.Y. 1949, 9 F.R.D. 203.

[12] Title VII of the Civil Aeronautics Act of 1938 contained the following provisions:

"Air Safety Board

. . .

"Sec. 701. . . .

"Preservation of Records and Reports

"(e) The records and reports of the Board shall be preserved in the custody of the secretary of the Authority in the same manner and subject to the same provisions respecting publication as the records and reports of the Authority, except that any publication thereof shall be styled 'Air Safety Board of the Civil Aeronautics Authority', and that no part of any report or reports of the Board or the Authority relating to any accident, or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports." 52 Stat. 1013.

United States.[13] It has done neither in connection with suits under the Federal Tort Claims Act.

Moreover we regard the recognition of such a sweeping privilege against any disclosure of the internal operations of the executive departments of the Government as contrary to a sound public policy. The present cases themselves indicate the breadth of the claim of immunity from disclosure which one government department head has already made. It is but a small step to assert a privilege against any disclosure of records merely because they might prove embarrassing to government officers. Indeed it requires no great flight of imagination to realize that if the Government's contentions in these cases were accepted the privilege against disclosure might gradually be enlarged by executive determinations until, as is the case in some nations today, it embraced the whole range of governmental activities.

We need to recall in this connection the words of Edward Livingston: "No nation ever yet found any inconvenience from too close an inspection into the conduct of its officers, but many have been brought to ruin, and reduced to slavery, by suffering gradual imposition and abuses, which were imperceptible, only because the means of publicity had not been secured."[14] And it was Patrick Henry who said that "to cover with the veil of secrecy the common routine of business, is an abomination in the eyes of every intelligent man and every friend to his country."[15]

It has been held that in criminal cases the Government has the choice either to reveal all evidence within its control which bears upon the charges or let the offense go unpunished, at least where the evidence is held by officials who are themselves charged with the administration of those laws for the violation of which the accused has been indicted.[16] We think that the Federal Tort Claims Act offers the Government an analogous choice in tort claims cases. The Government may decide to recognize the public interest involved in according justice to the private claimant who has brought suit against it by producing relevant documents in its possession upon an order of the court under Rule 34. On the other hand the Government may decide to give priority to the public interest which it

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13 For example, § 2507 of Title 28, United States Code, provides:

"§ 2507. Calls on departments for information.

"The Court of Claims may call upon any department or agency of the United States for any information or papers it deems necessary, and may use all recorded and printed reports made by the committees of the Senate or House of Representatives.

"The head of any department or agency may refuse to comply when, in his opinion, compliance will be injurious to the public interest."

14 Edward Livingston, Works, I, p. 15.

15 Elliot's Debates, vol. 3, p. 170.

16 United States v. Andolschek, 2 Cir. 1944, 142 F. 2d 503; United States v. Krulewitch, 2 Cir. 1944, 145 F. 2d 76; United States v. Beekman, 2 Cir. 1946, 155 F. 2d 580, 584; United States v. Grayson, 2 Cir. 1948, 166 F. 2d 863.

believes to be involved in preserving the documents from disclosure by declining to produce them upon the order of the court at the cost, if its claim of privilege is overruled, of having the facts to which the documents are directed taken by the court to be established against the United States under Civil Procedure Rule 37(b)(2)(i). This last is the alternative which the Government chose in the cases now before us. The Federal Rules of Civil Procedure offer such a choice to private litigants under similar circumstances and we are satisfied that under the Federal Tort Claims Act the same choice is presented to the Government which, as we have seen, has been placed by Congress in this respect in the position of a private individual defending against a tort action.

At this point we must pause to notice a procedural contention of the Attorney General. It is that since the question which we have been discussing involves the duty of the Secretary of the Air Force to produce the documents in question it may only be decided in a proceeding in which that official is brought into court by direct process to answer the plaintiffs' demands for production of the documents. We find no merit in this contention, however, since the order to produce the documents which was made by the district court in these cases was not directed to the Attorney General or any other officer of the Government. On the contrary, it was directed to "defendant, the United States of America, its agents and attorneys." Since obviously the United States can respond only by its agents and since the Secretary of the Air Force is the agent of the United States concerned with the documents here ordered to be produced it seems quite clear that the order is directed to and binding upon him just as much as upon the Attorney General who in these cases is merely attorney for the United States. Moreover we think that the Secretary of the Air Force recognized this fact when he presented his claim of privilege to the district court for its consideration and approval stating that the defendant, the United States, objected to production on the ground that the documents were privileged. Under these circumstances it was clearly within the judicial power of the court to pass upon the question of privilege thus raised.

The formal claim of privilege filed with the district court by the Secretary of the Air Force on August 9, 1950, laid a second basis for the claim in the following language:

> "The defendant further objects to the production of this report, together with the statements of witnesses, for the reason that the aircraft in question, together with the personnel on board, were engaged in a confidential mission of the Air Force. The airplane likewise carried confidential equipment on board and any disclosure of its mission or information con-

cerning its operation or performance would be prejudicial to this Department and would not be in the public interest."

The claim of privilege thus made is of a wholly different character from the one previously discussed. It asserts in effect that the documents sought to be produced contain state secrets of a military character. State secrets of a diplomatic or military nature have always been privileged from disclosure in any proceeding[17] and unquestionably come within the class of privileged matters referred to in Rule 34. Moreover this privilege, as well as the privilege previously mentioned against disclosure of official information which would be harmful to the interests of the United States, was fully recognized by the district judge in these cases in his final order. For as we have seen, he directed that the documents in question be produced for his personal examination so that he might determine whether all or any part of the documents contain, to use the words of his order, "matters of a confidential nature, discovery of which would violate the Government's privilege against disclosure of matters involving the national or public interest." The Government was thus adequately protected by the district court from the disclosure of any privileged matter contained in the documents in question.

The Government contends, as we have stated, that it is within the sole province of the Secretary of the Air Force to determine whether any privileged material is contained in the documents and that his determination of this question must be accepted by the district court without any independent consideration of the matter by it. We cannot accede to this proposition. On the contrary we are satisfied that a claim of privilege against disclosing evidence relevant to the issues in a pending law suit involves a justiciable question, traditionally within the competence of the courts,[18] which is to be determined in accordance with the appropriate rules of evidence,[19] upon the submission of the documents in question to the judge for his examination *in camera*.[20] Such examination must

[17] Totten v. United States, 1875, 92 U.S. 105, 107; Firth Sterling Steel Co. v. Bethlehem Steel Co., D.C.E.D.Pa. 1912, 199 F. 353; Pollen v. Ford Instrument Co., D.C.E.D.N.Y. 1939, 26 F. Supp. 583; 8 Wigmore on Evidence, 3d Ed., §§ 2212a, 2378; 1 Greenleaf on Evidence, Lewis's Ed., § 250.

[18] Cresmer v. United States, D.C.E.D.N.Y. 1949, 9 F.R.D. 203; Evans v. United States, D.C.W.D.La. 1950, 10 F.R.D. 255.

[19] Aaron Burr's Trial, Robertson's Rep. (1808), vol. 1, pp. 180-181; United States v. Ebeling, 2 Cir. 1944, 146 F.2d 254, 256-257; Wild v. Payson, D.C.S.D.N.Y. 1946, 7 F.R.D. 495, 499; 2 Moore's Federal Practice (1938) 2641.

[20] "It would rather seem that the simple and natural process of determination was precisely such a private perusal by the judge. Is it to be said that even this much of disclosure cannot be trusted? Shall every subordinate in the department have access to the secret, and not the presiding officer of justice? Cannot the constitutionally coordinate body of government share the confidence?" 8 Wigmore on Evidence, 3d Ed., p. 799.

See also 4 Moore's Federal Practice, 2d Ed., p. 1178.

obviously be *ex parte* and *in camera* if the privilege is not to be lost in its assertion. But to hold that the head of an executive department of the Government in a suit to which the United States is a party may conclusively determine the Government's claim of privilege is to abdicate the judicial function and permit the executive branch of the Government to infringe the independent province of the judiciary as laid down by the Constitution.[21]

The Government presses upon us the contrary conclusion of the British House of Lords in Duncan v. Cammell, Laird & Co., (1942) A.C. 624. The case is distinguishable in that the plans of the submarine "Thetis" there involved were obviously military secrets and the suit was between private parties. But we do not regard the case as controlling in any event. For whatever may be true in Great Britain[22] the Government of the United States is one of checks and balances. One of the principal checks is furnished by the independent judiciary which the Constitution established. Neither the executive nor the legislative branch of the Government may constitutionally encroach upon the field which the Constitution has reserved for the judiciary by transferring to itself the power to decide justiciable questions which arise in cases or controversies submitted to the judicial branch for decision.[23] Nor is there any danger to the public interest in submitting the question of privilege to the decision of the courts. The judges of the United States are public officers whose responsibility under the Constitution is just as great as that of the heads of the executive departments. When Government documents are submitted to them *in camera* under a claim of privilege the judges may be depended upon to protect with the greatest of care the public interest in preventing the disclosure of matters which may fairly be characterized as privileged.[24] And if, as the Government asserts is sometimes the case, a knowledge of background facts is necessary to enable one properly to pass on the claim of privilege those facts also may be presented to the judge *in camera*.

One final point remains to be considered. The Government points to Civil Procedure Rule 55 (e) which provides that "No judgment by default shall be entered against the United States . . . unless the claimant establishes his claim or right to relief by

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[21] United States v. Cotton Valley Operators Committee, D.C.W.D.La. 1949, 9 F.R.D. 719, 720, affirmed by equally divided court, 339 U.S. 940; 8 Wigmore on Evidence, 3d Ed., § 2379.

[22] Compare Duncan v. Cammell, Laird & Co., (1942) A.C. 624, with Robinson v. State of South Australia (No. 2), (1931) A.C. 704.
See Note, Administrative Discretion and Civil Liberties in England, 1943, 56 Harv. L. R. 806.

[23] Kilbourn v. Thompson, 1880, 103 U.S. 168, 182, 190; C. & S. Air Lines v. Waterman Corp., 1948, 333 U.S. 103, 113.

[24] See Berger and Krash, Government Immunity from Discovery, 1950, 59 Yale L.J. 1451, 1462-1464.

evidence satisfactory to the court." Its contention is that the order of the district court entered in these cases that the facts in plaintiffs' favor on the issue of negligence be taken as established because of the Government's refusal to produce the documents in question amounted to the entry of judgment against the United States by default in violation of the rule. We do not agree. Paragraph (a) of Rule 55 in effect defines judgment by default as the judgment which the clerk enters when a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by the rules. In the case before us the United States has filed answers and has vigorously defended the actions. The distinction is outlined in Rule 37(b)(2). That rule sets forth the relief which the court may grant upon the refusal of a party to produce evidence after having been directed to do so, as follows:

> "(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> "(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;
>
> "(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."

It will be observed that the order made by the court in these cases is of the type authorized by subparagraphs (i) and (ii), whereas a judgment by default against a disobedient party is specifically authorized by subparagraph (iii). We think it is clear from the language of the rules that the order made by the district court in these cases did not amount to a judgment by default within the meaning of Rule 55 (e).

We conclude (1) that the district court did not err in holding that good cause had been shown by the plaintiffs for production of the statements and the report in question which they asked the United States to produce, (2) that the district court rightly rejected the broad claim of privilege made by the United States not to produce any statements or reports regarding airplane accidents, (3) that the order of the district court entered on rehearing on plaintiffs' motions for the production of the documents rightly

provided for the determination by the court of the Government's claim of privilege as to any particular parts of the documents and (4) that upon the election of the United States nonetheless not to produce the documents, the order of the court directing that certain facts be taken as established against the United States in these cases was authorized by Rule 37 (b)(2)(i) and (ii) and was accordingly not erroneous.

Since we find no error the judgments entered in favor of the plaintiffs after trial of the issue of damages will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Received and Filed, Dec. 11, 1951, Ida O. Creskoff, Clerk.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10,483

PATRICIA J. REYNOLDS

vs.

UNITED STATES OF AMERICA, *Appellant*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: MARIS, GOODRICH and KALODNER, Circuit Judges.

Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case entered in favor of the plaintiffs after trial of the issue of damages be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF,
Clerk.

December 11, 1951

Received and Filed, Dec. 11, 1951, Ida O. Creskoff, Clerk.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10,484

PHYLLIS BRAUNER and ELIZABETH PALYA

vs.

UNITED STATES OF AMERICA, *Appellant*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: MARIS, GOODRICH and KALODNER, Circuit Judges.

Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case entered in favor of the plaintiffs after trial of the issue of damages be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF,
Clerk.

December 11, 1951

Received & Filed Jan. 15, 1952. Ida O. Creskoff, Clerk.

Civil Action No. 10142

No. 10,483

PATRICIA J. REYNOLDS

vs.

UNITED STATES OF AMERICA, *Appellant*

Mandate

UNITED STATES OF AMERICA, ss:
THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable, the Judges of the United States District Court for the Eastern District of Pennsylvania—GREETING:

WHEREAS, lately in the United States District Court for the Eastern District of Pennsylvania, before you or some of you, in a cause between Patricia J. Reynolds, Plaintiff, (Appellee) and United States of America, Defendant, (Appellant)—Civil Action No. 10142—a judgment was entered in the District Court on February 27, 1951, which judgment is of record in the office of the Clerk of the said District Court, to which reference is hereby made, and the same is hereby expressly made a part hereof, as by the inspection of the record of the said District Court, which was brought into the United States Court of Appeals for the Third Circuit by virtue of an appeal by United States of America agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

AND WHEREAS, the said cause came on to be heard before the said United States Court of Appeals for the Third Circuit, on the said record, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case entered in favor of the plaintiff after trial of the issue of damages be, and the same is hereby affirmed.

December 11, 1951

YOU, THEREFORE, ARE HEREBY COMMANDED that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws

of the United States, ought to be had, the said appeal notwithstanding.

Signed and sealed this 15th day of January in the year of our Lord one thousand nine hundred and fifty-two.

IDA O. CRESKOFF,
Clerk, United States Court of
Appeals for the Third Circuit

Received & Filed Jan. 15, 1952. Ida O. Creskoff, Clerk.

Civil Action No. 9793

No. 10,484

PHYLLIS BRAUNER and ELIZABETH PALYA

vs.

UNITED STATES OF AMERICA, *Appellant*

Mandate

UNITED STATES OF AMERICA, ss:
THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable, the Judges of the United States District Court for the Eastern District of Pennsylvania—GREETING:

WHEREAS, lately in the United States District Court for the Eastern District of Pennsylvania, before you or some of you, in a cause between Phyllis Brauner and Elizabeth Palya, Plaintiffs, (Appellees) and United States of America, Defendant, (Appellant) —Civil Action No. 9793—a judgment was entered in the District Court on February 27, 1951, which judgment is of record in the office of the Clerk of the said District Court, to which reference is hereby made, and the same is hereby expressly made a part hereof, as by the inspection of the record of the said District Court, which was brought into the United States Court of Appeals for the Third Circuit by virtue of an appeal by United States of America agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

AND WHEREAS, the said cause came on to be heard before the said United States Court of Appeals for the Third Circuit, on the said record, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case entered in favor of the plaintiffs after trial of the issue of damages be, and the same is hereby affirmed.
December 11, 1951

YOU, THEREFORE, ARE HEREBY COMMANDED that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws

of the United States, ought to be had, the said appeal notwithstanding.

Signed and sealed this 15th day of January in the year of our Lord one thousand nine hundred and fifty-two.

IDA O. CRESKOFF,
Clerk, United States Court of Appeals for the Third Circuit

Clerk's Certificate

I, Ida O. Creskoff, Clerk of the United States Court of Appeals for the Third Circuit, DO HEREBY CERTIFY the foregoing to be a true and faithful copy of the original Appendix to Brief for Appellant in the cases of Patricia J. Reynolds vs. United States of America, appellant, No. 10,483, and Phyllis Brauner and Elizabeth Palya vs. United States of America, appellant, No. 10,484, on file and now remaining among the records of the said Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 2d day of February in the year of our Lord one thousand nine hundred and fifty-two, and of the Independence of the United States the one hundred and seventy-sixth.

IDA O. CRESKOFF,
Clerk of the U. S. Court of Appeals,
Third Circuit.

SEAL

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75a Supreme Court of the United States

No. 638, October Term, 1951

THE UNITED STATES OF AMERICA, PETITIONER

v.

PATRICIA J. REYNOLDS, PHYLLIS BRAUNER AND ELIZABETH PALYA

Order allowing certiorari

Filed April 7, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1951

UNITED STATES OF AMERICA, PETITIONER

v.

PATRICIA J. REYNOLDS, PHYLLIS BRAUNER, AND ELIZABETH PALYA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 638

UNITED STATES OF AMERICA, PETITIONER

v.

PATRICIA J. REYNOLDS, PHYLLIS BRAUNER, AND ELIZABETH PALYA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit entered in the above case on December 11, 1951.

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Pennsylvania (R. 22) is reported at 10 F.R.D. 468. The opinion of the Court of Appeals for the Third Circuit (R. 52) is reported at 192 F. 2d 987.

JURISDICTION

The judgments of the Court of Appeals for the Third Circuit were entered on December 11, 1951 (R. 67-68). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

In suits under the Tort Claims Act respondents sought discovery, under Rule 34 of the Federal Rules of Civil Procedure, of accident investigation reports prepared by the Air Force. The Secretary of the Air Force filed a claim of privilege in the District Court on the ground that the disclosure of the reports would seriously hamper national security and flying safety as well as the development of highly technical military equipment, and would discourage uninhibited statements by witnesses in the course of such investigations. The District Court nevertheless ordered the reports produced so that it might review the claim of privilege, and when the Secretary declined to produce them, ordered that respondents' version of the facts on the issue of negligence be taken as established. The Court of Appeals affirmed. The questions presented are:

1. Whether the Secretary's determination that the documents are privileged can, consistently with R.S. 161 and the doctrine of separation of powers, be reviewed by the judiciary.

2. Whether Congress in the Tort Claims Act could or intended to force the executive to submit

to judicial review of his determination or suffer judgment to be entered against the United States.

3. Whether the validity of the Secretary's determination can be tested in this case in the absence of the issuance of direct process against him.

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

The pertinent portions of R.S. 161, 5 U.S.C. 22, the Federal Tort Claims Act (28 U.S.C. 2674), Rules 34 and 37 of the Federal Rules of Civil Procedure, Air Force Regulation Nos. 62-14, 62-14A, and 62-7, Joint Army and Air Force Adjustment Regulations No. 1-11-60, and Army Regulation No. 420-5 are set forth in the Appendix at pp. 17-30.

STATEMENT

These suits under the Tort Claims Act arise from the death of three civilians in the crash of a B-29 aircraft at Waycross, Georgia on October 6, 1948. The basic facts, which are not in dispute, are as follows: The aircraft, carrying nine crew members and four civilian observers, had taken off from Robbins Air Force Base on a flight to Orlando, Florida, for the purpose of an experimental testing of secret electronics equipment (R. 52). Of the thirteen persons aboard ship, nine were killed, including six members of the crew and three civilian observers, who were engineer employees of the contractor and subcontractor involved in the research and development of the electronics equipment being tested (R. 52). These suits were

instituted in the Eastern District of Pennsylvania by respondents, the widows of the three deceased civilian employees, each suit asking for $300,000 damages for the wrongful deaths of the deceased (R. 52).

Following the institution of the suits and the filing by the Government of a general denial, respondents moved under Rule 34 of the Federal Rules of Civil Procedure for production of the official accident investigation report prepared by officers of the Air Force, and the statements of the surviving crew members[1] taken in connection with that investigation (R. 19-21). The Government moved to quash the motion, chiefly on the ground that the accident investigation report was privileged pursuant to Air Force regulations promulgated under R.S. 161, 5 U.S.C. 22 (R. 22).

On June 30, 1950, Judge Kirkpatrick sustained plaintiffs' motion to produce (R. 2), holding that good cause for production had been shown under Rule 34 (R. 26) and on the privilege question adhering to the views which he had expressed in *O'Neill* v. *United States*, 79 F. Supp. 827 (R. 26). An order to produce was then entered (R. 2).

Subsequent to that order, a letter from the Secretary of the Air Force was presented to Judge

[1] Respondents first submitted detailed interrogatories under Rule 33, which asked *inter alia* for copies of any accident investigation report and for the statements of survivors. The answer to the interrogatories declined to comply with the demand for production on the ground that such a production was not within the scope of Rule 33.

Kirkpatrick. The letter stated that it was not in the public interest to furnish the accident investigation report, and that such reports were prepared under controlling regulations designed to collect information for the development of measures to prevent accidents and to promote flying safety. The matter was stated to be one of primary importance to the Air Force and it was pointed out that such aircraft accident reports were restricted to the official purposes for which they were intended, not being available in any form for disciplinary action or for the determination of pecuniary liability.[2]

Subsequent to this letter, a rehearing was held on August 9, 1950 (R. 2), on respondents' motion for production of documents. At this hearing, the district judge received a "formal claim of privilege"

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[2] The pertinent portion of the letter is as follows (R. 53-54):

"Acting under the authority of Section 161 of the Revised Statutes (5 U.S.C. 22), it has been determined that it would not be in the public interest to furnish this report of investigation as requested by counsel in this case. This report was prepared under regulations which are designed to insure the collection of all pertinent information regarding aircraft accidents in order that all possible measures will be developed for the prevention of accidents and the optimum promotion of flying safety. Because this matter is one of such primary importance to the Air Force, it has been found necessary to restrict the use of aircraft accident reports to the official purpose for which they are intended. Under our regulations, this type of report is not available in courts-martial proceedings or other forms of disciplinary action or in the determination of pecuniary liability.

"It is hoped that the extreme importance which the Department of the Air Force places upon the confidential nature of its official aircraft accident reports will be fully appreciated and understood by your Honorable Court."

(R. 28) by the Secretary of the Air Force, setting forth the basis for the claim and the authority for the privilege, supported by an affidavit of the Secretary showing his right to promulgate regulations under R.S. 161 and describing the applicable regulations (R. 32). In addition, an affidavit by the Air Force Judge Advocate General was filed (R. 34) which set forth the names and addresses of the survivors, undertook to make those witnesses available for interrogation at government expense, and guaranteed to authorize the witnesses to testify to all matters pertaining to the cause of the accident, except as to classified material. Further, the affidavit of the Judge Advocate General, after pointing out that all records other than those classified or privileged had already been made available to the plaintiffs, specifically stated that the investigation board report and survivors' statements could not be furnished without seriously hampering national security, flying safety, and the development of highly technical military equipment.

The District Court, on September 21, 1950, ordered the Government to produce the documents in question for examination so that the court could determine whether disclosure "would violate the Government's privilege against disclosure of matters involving the national or public interest" (R. 36). The Government declined to comply with this order, and on October 12, 1950, the District

Court ordered that the facts in respondents' favor on the issue of negligence be taken as established (R. 37).[3] Subsequently, a hearing was held on the question of damages and judgment was entered for respondents on February 27, 1951 (R. 41-42).[4]

On appeal, the Court of Appeals affirmed. The court dealt only briefly with the question of "good cause" and concluded that it could not find error in the district judge's decision (R. 56). On the privilege issue, the court first outlined what it conceived to be the question before it. It declared that the cases of *Boske* v. *Comingore*, 177 U.S. 459, and *Touhy* v. *Ragen*, 340 U.S. 462, were not in point, because these suits were against the United States and, therefore, if the United States as a party defendant could properly be ordered to produce the documents, the Secretary of the Air Force was clearly required to comply (R. 57). On the same rationale, it disposed of what it described as "difficult constitutional questions" which might

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[3] Rule 37(b)(2) of the Federal Rules provides that, if a party refuses to comply with an order under Rule 34 to produce documents, the court may make "An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order," as well as an order "refusing to allow the disobedient party to support or oppose designated claims or defenses * * *."

[4] The court awarded $80,000 in the *Palya* case and the *Brauner* case, and $65,000 in the *Reynolds* case. The amount of damages was not challenged in the Court of Appeals and is not in issue here.

arise if enforcement of the District Court's order to produce had been sought by subpoena and avoided any question of the validity of the regulations promulgated by the Secretary with respect to the custody and production of the Department's papers (R. 57-58).

The question of the propriety of the order against the United States, as a party defendant, was resolved by the Court of Appeals solely with reference to the Tort Claims Act. It relied heavily on the provision of that Act that the United States "shall be liable * * * in the same manner and to the same extent as a private individual under like circumstances" and the fact that the Act made the Federal Rules of Civil Procedure applicable to suits thereunder.

The court then went on to consider the propriety of the Government's claim of privilege in these cases. It refused to recognize the claim of privilege based on the desire to encourage "uninhibited admissions" (R. 35) by witnesses in the course of accident investigations, declaring that such an absolute "housekeeping" privilege would be contrary to public policy (R. 60, 61). By analogy to criminal cases, the court held that the Government in tort cases can either choose to produce documents, or, if it feels the public policy against disclosure is sufficiently strong, to suffer judgment to be entered for the plaintiffs. On the claim of privilege against disclosure of military secrets,

it was held that such a claim of privilege involved a justiciable question to be determined by the district judge after examination *in camera* (R. 63).

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it erroneously interprets the Tort Claims Act so as to disrupt the orderly administration of the executive departments and to permit encroachment by the judiciary on an area committed by the Constitution to executive discretion. Either the decision below is in conflict with the decisions of this Court in *Boske* v. *Comingore*, 177 U.S. 459, and *Touhy* v. *Ragen*, 340 U.S. 462, or, if it is not so in conflict, the "issues of far-reaching importance"[5] left undecided in those cases must be faced. In either event, this Court should grant review.

1. As we note below (*infra*, pp. 14-15), it is questionable whether under *Boske* v. *Comingore, supra*, and *Touhy* v. *Ragen, supra*, the validity of the determination of the Secretary of the Air Force, that disclosure of the documents sought would not be consistent with the public interest, can be tested in the absence of direct process against the Secretary, which was not had in this case.

But if the court below held correctly that the Secretary's determination can be challenged indirectly in a suit under the Tort Claims Act, then there are presented many of the questions which

[5] *Touhy* v. *Ragen*, 340 U.S. 462 at 470 (Mr. Justice Frankfurter concurring).

the Court found it unnecessary to face in *Touhy* v. *Ragen, supra.* The procedural problem aside, the vital questions remain of the power of the judiciary to order production of documents which the executive chooses to withhold, or to substitute its judgment for the judgment of the executive as to whether certain documents can be disclosed consistently with the public interest. Those questions have twice recently been before the Court but have not been decided. Our arguments stemming from R.S. 161 and the Constitution were fully briefed and presented orally in *Touhy* v. *Ragen, supra,* and *United States* v. *Cotton Valley Operators Committee,* 339 U.S. 940.[6] Those arguments will not again be spelled out here. They are perhaps best summarized by the following quotation from 40 Op. A.G. 45, 49:

> This discretion in the executive branch has been upheld and respected by the judiciary. The courts have repeatedly held that they will not and cannot require the executive to produce such papers when in the opinion of the executive their production is contrary to the public interests. The courts have also held that the question whether the production of the papers would be against the public interest is one for the executive and not for the courts to determine.

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[6] See Brief for the United States, No. 490, October Term, 1949, at pp. 29-64 (*Cotton Valley* case), and Brief for the Respondent George R. McSwain, No. 83, October Term, 1950, at pp. 18-44 (*Touhy* case).

2. The court below sought to avoid the questions raised by R.S. 161 and the "difficult constitutional questions" (R. 58) arising out of the separation-of-powers doctrine solely by reliance on the Tort Claims Act. Because that Act made the United States liable "as a private individual under like circumstances" (28 U.S.C. 2674), and made the Federal Rules of Civil Procedure applicable to tort actions against the United States (*United States* v. *Yellow Cab Company*, 340 U.S. 543, 553), the court concluded that Congress had "withdrawn" the executive privilege (R. 58) and that the Secretary of the Air Force must obey an order directed against the United States as a party defendant or permit judgment to be entered against "the Government." But the fundamental questions cannot be so easily avoided.

Insofar as the executive privilege is statutory in origin, the court below failed to accord to R.S. 161 the weight to which a statute of such long standing is ordinarily entitled. The Act has been consistently construed as confirming in the executive the discretion to refuse to produce documents when he believes disclosure is contrary to the public interest. "We cannot impute to Congress such a radical departure from established law in the absence of express congressional command" (*Feres* v. *United States*, 340 U.S. 135, 146). Cf. *Inland Waterways Corp.* v. *Young*, 309 U.S. 517; *Commissioner* v. *South Texas Company*, 333 U.S. 496, 502-3. The

Tort Claims Act is certainly not such an express command. It is not enough to say, as did the court below, that the Act intended the United States to be suable in every respect as a private party. There are areas, such as that involved here, where the United States cannot be analogized to a private party. Cf. *Feres* v. *United States, supra.* In those areas, Congress cannot be deemed to have intended the courts to treat "the Government" mechanically as any private party.

That Congress did not so intend becomes even clearer when we consider that its power to do so is of dubious constitutionality. If the executive privilege stems, as we believe, directly from the basic premise of separate but equal branches of the Government, Congress can no more take away that privilege by statute than can the courts by judicial decision. And it is very questionable whether Congress can force the executive either to submit to judicial review of its determination or to permit judgment to be entered against the Government. But even if the doubtful constitutional questions be resolved in favor of the power of Congress in this area, the exercise of such power constitutes an extraordinary invasion of the province of the executive. The court below failed completely to show that such an invasion was intended by Congress.

The Court of Appeals also supported its conclusion by drawing an analogy between the position of the executive in cases of this sort and the position of the Government in criminal cases, where it has

been held by lower courts that the Government cannot refuse to disclose the contents of documents relevant to the defense and at the same time continue the prosecution. The analogy is not apt. The principles which underlie our system of criminal jurisprudence dictate that the accused be given all reasonable aids to his defense. The constitutional bias against conviction of innocent men is so strong that it is not unreasonable to require the prosecuting arm of the Government to choose between allowing possibly guilty men to escape or disclosing information which is necessary to the defense of the accused. There is no such constitutional basis in favor of a civil claimant against the Government—whom Congress need not even permit to litigate—and the considerations of public policy which underlie the executive discretion to refuse disclosure should not be sacrificed in the interests of making such civil claims more easily prosecuted.

The Secretary here offered to make all witnesses available to respondents at government expense, and to authorize them to testify as to all material not classified. It may be, as the District Court found here, that a plaintiff would fare better if he obtained the documents sought and that "good cause" for their production could be shown.[7] We believe, however, that plaintiffs, even under the

[7] The District Court found that good cause for the production of documents had been shown. The Court of Appeals affirmed. We do not urge the holding of good cause as a reason for granting the writ, but we reserve the right to raise the question in the event this petition is granted.

Tort Claims Act, must sometimes sue the United States at a disadvantage. In any event, the choice—between making the task of plaintiffs somewhat more difficult and permitting an invasion of the integrity of the executive departments—is one for this Court to make.

3. In *Boske* v. *Comingore*, 177 U.S. 459, and *Touhy* v. *Ragen*, 340 U.S. 462, the Court held that, where production of departmental documents [8] is declined by virtue of orders of heads of departments issued pursuant to R.S. 161 (5 U.S.C. 22), the validity of that action cannot be challenged except by direct process against the head of the department. The court below held, however, that in this case direct process need not be issued against the Secretary of the Air Force because the suit was against the United States and the Secretary was bound to obey an order issued against the United States as a party defendant. We believe, however, that the requirement of the *Boske* and *Touhy* cases was more than merely technical and cannot be avoided simply because the United States is the party defendant. We submit that those cases require that, after the decision by the head of the department, the issue of the validity of his decision

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[8] In *Boske* v. *Comingore*, *supra*, the court sought to force the production by a Collector of Internal Revenue of distillers' reports in his possession. In *Touhy* v. *Ragen*, *supra*, the papers sought were in the custody of the United States Attorney. In both cases, departmental regulations forbade the production of such documents except in the discretion of the head of the department.

should be tested directly. Here, for example, proceedings should have been instituted under Rules 26 and 45 to bring the Secretary of the Air Force squarely before the court. If such a procedure were followed, final decision on the propriety of his action would permit both parties to the case to proceed to the merits, either with or without the disclosure requested.

4. The questions presented by this case are of great and recurring significance in the administration of the Tort Claims Act and elsewhere.[9] The important nature of these issues has already been recognized by this Court as recently as *Touhy* v. *Ragen*, *supra*. The serious questions of public policy involved here and the effect of the decision below, if unreversed, upon the historic division of responsibility among the various branches of our Government make this case a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

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[9] The issue, in one facet or another, has been present in the *Cotton Valley* and *Touhy* cases, in the lower courts in *Mandel* v. *United States*, No. 414, this Term (pending before this Court on another issue), in *O'Neill* v. *United States*, 79 F. Supp. 827 (E.D. Pa.), *Bank Line Limited* v. *United States*, 68 F. Supp. 587, 76 F. Supp. 801 (S.D. N.Y.), 163 F. 2d 133 (C.A. 2), and *Alltmont* v. *United States*, 177 F. 2d 971 (C.A. 3)—to mention only recent reported cases. See also Brief for the United States in the *Cotton Valley* case, No. 490, Oct. Term, 1949, at p. 59.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

MARCH 1952.

APPENDIX

1. Section 161 of the Revised Statutes, 5 U. S. C. 22, provides:

> The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

2. 28 U. S. C. 2674 provides in pertinent part as follows:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

3. Rule 34 of the Federal Rules of Civil Procedure, as amended, provides:

> *Discovery and Production of Documents and Things for Inspection, Copying, or Photographing.* Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30 (b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers,

books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26 (b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26 (b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

4. Rule 37. *Refusal to Make Discovery: Consequences.*

* * * * *

(b) Failure to Comply with Order.

* * * * *

(2) *Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court

may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.

5. AF Regulation No. 62-14.

Headquarters, Army Air Forces
Washington, 20 October 1944

FLYING SAFETY

Investigation and Reporting of Aircraft Accidents, Emergency Procedures for Accidents and Overdue Aircraft (Clearance Nos. AAF-FS-T8 and AAF-FS-T9).

(This Regulation supersedes AAF Regulations 62-14, 26 May 1942, 62-14A, 28 January 1944, and 15-14, 7 September 1942).

* * * * *

PART FOUR

INVESTIGATION AND REPORTING

* * * * *

SECTION II—APPOINTMENT OF AIRCRAFT ACCIDENT INVESTIGATING BOARDS AND OFFICERS

40. *Appointment of Aircraft Accident Investigating Boards.* The Commanding officer of each AAF station will appoint one or more Aircraft Accident Investigating Boards to conduct investigations required of such boards by this Regulation.

a. Three (3) officers will be appointed to constitute each board. Of the three (3) members, two, (2) will be pilot officers possessing outstanding experience or other qualifications warranting such appointment; and the other will be that available officer present possessing the widest engineering experience or training. The station commanding officer is authorized to appoint board members from the officer personnel of all organizations regularly based at or attached to his station as well as from officer personnel under his command.

b. Alternate members, similarly qualified, will be appointed for board members, and, in the absence of any board members, may be detailed by the senior member of the board present to perform the duties of the absent members.

c. All members of such boards, or alternates when serving, will personally engage in the required investigations and assist in the preparation of the required reports.

d. Ex-officio, non-voting members,

(1) (a) Representatives of Headquarters AAF, Office of Flying Safety are authorized and empowered to, and may, when so directed:

(1) Act as ex-officio and non-voting members of Aircraft Accident Investigating Boards and exercise technical supervision over and review the activities of the Board and the Station Accident Officer.

(2) Submit separate reports through channels or direct, concurring or dissenting from the reports of boards or accident officers.

(3) Conduct independent investigations of the aircraft accidents and "missing" aircraft with which this Regulation is concerned, including investigation of conditions at installations relating to or resulting in such accidents or "missing" aircraft.

(b) Commanding Officers will render full assistance as requested by such representatives of the Office of Flying Safety

and will furnish to them such transportation, clerical help, military personnel, etc., as may be required.

(2) The intelligence officer of the station will serve as an ex-officio, non-voting member of the board but otherwise with full authority of a board member and with the particular responsibility to determine whether the available evidence has disproved the existence of sabotage. He will have full authority to make separate intelligence investigations and reports on any accident, and all such activity undertaken by the intelligence officer, or Counter Intelligence Corps personnel under his direction, will be conducted in strict compliance with the provisions of TM 30-218 and such other policies and directives as may be issued by G-2, War Department General Staff, or AC/AS, Intelligence. When the intelligence officer of the station is unable to serve with the board, the commanding officer of the station will appoint the senior intelligence officer available to act as the intelligence, ex-officio, non-voting member of the board.

(3) The senior medical officer of the station will recommend a medical officer, preferably a Flight Surgeon or Aviation Medical Examiner, who will serve as an ex-officio, non-voting member of the board but otherwise with full authority of a board member and with additional authority and responsibility to make

separate reports for medical channels. The senior medical officer of the station will also recommend an alternate medical officer who will act in the absence of the medical officer member.

* * * * *

SECTION III—INVESTIGATIONS AND REPORTS

* * * * *

46. *Purpose of Investigation—Not Investigation Under the 70th Article of War.* Witnesses appearing before an Aircraft Accident Investigating Board or officer conducting an investigation required by this Regulation should be advised that such investigation is not one conducted under the 70th Article of War and that the purpose of such investigation is not to secure evidence for disciplinary action but to determine all factors in connection with accidents involving aircraft and to prevent recurrence of same in the interest of flying safety.

47. *Attachments:*

a. Personnel required herein to conduct investigations and submit reports are authorized to obtain from any AAF personnel, including surviving crew members, operations officers, engineering officers, weather personnel, tower operators, inspectors, post engineers, medical officers, civilian agencies contracting with, or civilians employed by the War Department, etc., information, data, and records, which may be of aid in completing such investigations and reports, and will attach same to AAF Forms 14 when

applicable as provided in the Aircraft Accident Investigators' Handbook. Station Accident Officers are specifically authorized to obtain information, data, and opinions from the medical officer member of the local Aircraft Accident Investigating Board.

6. Amendment, AF Regulation No. 62-14A

Headquarters, Army Air Forces

Washington, 26 February 1947

* * * * *

FLYING SAFETY

Investigation and Reporting of Aircraft Accidents Emergency Procedures for Accidents and Overdue Aircraft.

(This Regulation supersedes AAF Regulation 62-14A, 4 January 1946; and amends AAF Regulation 62-14, 20 October 1944.)

* * * * *

46. *Purpose and Nature of Investigation:*

a. Witnesses appearing before an aircraft accident investigating board or officer conducting an investigation required by this Regulation will be advised:

(1) That the purpose of the investigation is to determine all factors in connection with the accident and to prevent a recurrence of the accident in the interest of flying safety.

(2) That it is not for the purpose of obtaining evidence for disciplinary action, for determining liability or line-of-duty status, or for reclassification.

(3) That it is not conducted under the 70th Article of War.

b. When disciplinary action, action to determine pecuniary liability, or line-of-duty status of any military personnel, or action to initiate reclassification is indicated as a result of an aircraft accident:

(1) Any investigation leading toward disciplinary action, whether conducted under the 70th Article of War or otherwise, or toward determining pecuniary liability or line-of-duty status, or toward reclassification, will be entirely separate and apart from the investigation required by this Regulation.

(2) The report of investigation required herein (AAF Form 14, or 14A, with attachments) will not be used in any manner in connection with any investigation or proceeding leading toward disciplinary action, determination of pecuniary liability or line-of-duty status, or reclassification.

* * * * *

IRA C. EAKER,
Lieutenant General, United States Army,
Deputy Commander, Army Air Forces.

OFFICIAL:
H. G. CULTON,
Colonel, Air Corps
Air Adjutant General.

7. AF Regulation, No. 62-7.

Department of the Air Force Headquarters,
United States Air Force, Washington
17 December 1947

FLYING SAFETY

Safeguarding Aircraft Accident Information

(This Regulation supersedes AF Letter 62-7, 19 September 1944).

1. *Definitions.* For the purpose of this Regulation the following definitions will apply.

a. *"Extract of a Report"*—is a summary, excerpt, quotation, or condensation of the report which contains the time or place of the incident, names of the persons involved, or aircraft serial number.

b. *"Officials in the Authorized Chain of Command"*—are commanders and individuals under their command at all echelons in the National Military Establishment whose official duties in connection with aircraft accident prevention require knowledge or possession of accident information.

2. *General.* Reference is made to AR's 95-120, 380-5, and 420-5; AF Regulations 46-17, 47-4, and 62-14; and AF Letter 45-6. In addition to the established procedure for handling and releasing classified information, there are additional safeguards necessary for aircraft accident information. Acci-

dent investigations are not conducted under the 70th Article of War. Aircraft accident information is procured from reports of personnel who have waived their rights under the 24th Article of War in the interest of accident prevention upon the assurance that the reports will not be used in any manner in connection with any investigation or proceeding toward disciplinary action, determination of pecuniary liability, or line-of-duty status or reclassification.

3. *Purpose.* Since certain facts have been accumulated as a result of aircraft accident investigation, it is convenient in many instances to abstract data from these reports for purposes other than the prevention of accidents. This violates the purpose for which the information was accumulated. The purpose of this Regulation is to limit the uses of accident information to accident prevention and such additional uses as authorized in this Regulation.

4. *Handling of Aircraft Accident Information within the Authorized Chain of Command:*

a. Reports of boards of officers, special accident reports, or extracts therefrom will not be furnished or made available to persons outside the authorized chain of command without the specific approval of the Secretary of the Air Force.

b. All aircraft accident data (reports, statistics, studies, publications, etc.) will be classified no lower than *Restricted.*

Higher classification is governed by AF Regulation 62-14.

* * * * *

5. *Release of Aircraft Accident Information:*

* * * * *

b. Reports of boards of officers, special accident reports, or extracts therefrom will not be furnished or made available to persons outside the authorized chain of command without the specific approval of the Secretary of the Air Force.

* * * * *

g. * * * (1) Manufacturers' representatives who are stationed with Air Force organizations to assist in solving maintenance and operational problems of products manufactured by the organizations they represent are to be given full access to the scene of any and all accidents involving such products and to all information concerning such accident that may be obtained by the Air Force except the official written reports of investigations or extracts therefrom.

* * * * *

6. *Responsibility:*

a. Responsibility for the release of reports of boards of officers, special accident reports, or extracts therefrom regarding aircraft accidents to persons outside the authorized chain of command or

administration will rest solely with the Secretary of the Air Force.

8. Joint Army and Air Force Adjustment Regulations No. 1-11-60.

JAAFAR 1-11-60
1-2

Departments of the Army and the Air Force
Washington 25, D. C., 11 May 1949

ORGANIZATION

TRANSFER OF FUNCTIONS, POWERS, AND DUTIES RELATING TO CLAIMS AND LITIGATION

* * * * *

7. Administrative instructions.—Implementation of transfers contained herein will result in appropriate amendments to all existing directives during normal revision cycle. Until such time as these directives are revised or new publications issued, all references to the Secretary of War (Secretary of the Army) and the War Department (Department of the Army) will, for matters pertaining to the Department of the Air Force, be construed to refer equally to the Secretary of the Air Force and the Department of the Air Force.

9. Army Regulations No. 420-5.

AR 420-5
1-5

War Department, Washington, May 20, 1940

BOARDS OF OFFICERS FOR CONDUCTING INVESTIGATIONS

* * * * *

SECTION V

REPORTS OF PROCEEDINGS

* * * * *

29. Copies of reports.—A board is not authorized to furnish copies of its reports to anyone other than the authority directing the investigation or his duly appointed representative. (See par. 18). Final decision as to furnishing reports or extracts therefrom to persons other than officials authorized by the chain of command or administration to receive them rests with the Secretary of War. (See par. 11d, AR 35-7020; Dig. Op. JAG, 1912, p. 828; and Dig. Op. JAG 1912-30, sec. 994.)

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No. 21

In the Supreme Court of the United States

OCTOBER TERM, 1952

UNITED STATES OF AMERICA, PETITIONER

v.

PATRICIA J. REYNOLDS, PHYLLIS BRAUNER, AND ELIZABETH PALYA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the District Court for the Eastern District of Pennsylvania (R. 17-21) is reported at 10 F.R.D. 468. The opinion of the Court of Appeals for the Third Circuit (R. 44-58) is reported at 192 F. 2d 987.

JURISDICTION

The judgments of the Court of Appeals were entered on December 11, 1951 (R. 59-60). The petition for a writ of certiorari was filed on March

7, 1952, and granted on April 7, 1952. 343 U.S. 918. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

In suits under the Tort Claims Act respondents sought discovery, under Rule 34 of the Federal Rules of Civil Procedure, of the report of an Air Force Accident Investigation Board and of statements made to the Board. The Secretary of the Air Force filed a claim of privilege in the District Court on the ground that the disclosure of the Board's reports and the statements would seriously hamper national security and flying safety as well as the development of highly technical military equipment, and would discourage uninhibited statements by witnesses in the course of such investigations. The District Court nevertheless ordered the reports of the Accident Investigation Board and the statements produced so that it might review the claim of privilege, and when the Secretary declined to produce them, ordered that respondents' version of the facts on the issue of negligence be taken as established. The Court of Appeals affirmed. The questions presented are:

1. Whether the Secretary's determination that the documents are privileged can and should, consistently with R.S. 161 and the doctrine of separation of powers, be reviewed by the judiciary.

2. Whether Congress in the Tort Claims Act could or intended to force the executive to submit to judicial review of his determination or suffer

judgment to be entered against the United States.

3. Whether respondents have shown good cause for discovery, as required by Rule 34, Federal Rules of Civil Procedure.[1]

4. Whether the validity of the Secretary's determination can be tested in this case in the absence of the issuance of direct process against him.

STATUTES, RULES AND REGULATIONS INVOLVED

The pertinent portions of R.S. 161, 5 U.S.C. 22; the Federal Tort Claims Act (28 U.S.C. 2674); Rules 34, 37 and 55 of the Federal Rules of Civil Procedure; and Air Force Regulations Nos. 62-14A and 62-7 are set forth in the Appendix at pp. 75-81.

STATEMENT

These were actions under the Federal Tort Claims Act, arising from the deaths of three privately employed engineers in the crash of an Air Force B-29 Bomber near Waycross, Georgia, on October 6, 1948 (R. 4).[2] The facts, which are not in dispute, are as follows:—

The aircraft, carrying nine crew members and four privately employed observers, was engaged in operations for the experimental testing of secret electronics equipment. Of the thirteen persons aboard, nine were killed, including six crew mem-

[1] The right to present this question, not set forth in the petition for certiorari as one of the questions presented, was reserved by us at that time (Pet. 13, fn. 7).

[2] Two of the plaintiffs, Brauner and Palya, joined in the institution of one action; the third, Reynolds, instituted a separate action (R. 1, 3); all three actions were consolidated for trial and on appeal in the court below (R. 37).

bers and the three civilian decedents, who were employees of the contractor and subcontractor developing the equipment being tested. The widows of the three brought these actions in the District Court for the Eastern District of Pennsylvania, seeking $300,000 each as damages under the wrongful death statute of Georgia (R. 4-6).

The only issue raised by the pleadings was that of the negligence of the Government (R. 7). The plaintiffs moved under Rule 34, Federal Rules of Civil Procedure, *infra*, pp. 75-76,[3] for an order directing the government to produce (1) the official report of the Air Force Accident Investigation Board conducted under its regulations, *infra*, pp. 76-81, and (2) the statements made by the surviving members of the crew at the closed hearings before that Board (R. 14-16). The District Court granted the motion for discovery, holding (1) that the plaintiffs' affidavits (R. 15, 16), which stated generally that knowledge of the contents of the documents in question was "essential to a preparation of plaintiffs' case for trial", constituted an adequate showing of good cause within the requirements of Rule 34 and (2) that the documents were not privileged (R. 17-21).

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[3] Respondents first submitted interrogatories under Rule 33. These included requests that the accident investigation report and the statements of survivors be attached to the answer (R. 8-11). The answer to the interrogatories declined to produce the documents on the ground that such discovery was not within the scope of Rule 33 (R. 11-14). *Hickman* v. *Taylor*, 329 U.S. 495, 504; *Alltmont* v. *United States*, 177 F. 2d 971 (C.A. 3), certiorari denied, 339 U.S. 967. Respondents then proceeded with their motion under Rule 34 (R. 14).

After having been notified of this action, the Secretary of the Air Force, on his own initiative, caused a letter to be presented to the District Court. This letter stated:

> Acting under the authority of Section 161 of the Revised Statutes (5 U.S.C. 22), it has been determined that it would not be in the public interest to furnish this report of investigation as requested by counsel in this case. This report was prepared under regulations which are designed to insure the collection of all pertinent information regarding aircraft accidents in order that all possible measures will be developed for the prevention of accidents and the optimum promotion of flying safety. Because this matter is one of such primary importance to the Air Force, it has been found necessary to restrict the use of aircraft accident reports to the official purpose for which they are intended. Under our regulations, this type of report is not available in courts-martial proceedings or other forms of disciplinary action or in the determination of pecuniary liability.
>
> It is hoped that the extreme importance which the Department of the Air Force places upon the confidential nature of its official aircraft accident reports will be fully appreciated and understood by your Honorable Court.

On the basis of this letter, the District Court held a rehearing of the motion for discovery (R. 21, 28). At this hearing a formal claim of privilege, signed by the Secretary, and reiterating the

grounds set forth above, was presented to the court (R. 21-25). The claim further stated that the airplane involved had been carrying confidential equipment and that disclosure of details of its mission, operation or performance would for that reason be against the public interest. Two affidavits were also submitted, one by the Secretary (R. 25), which set forth the statutory authority for the regulations forbidding disclosure of reports and proceedings of Accident Investigation Boards, and the other (R. 27) by the Judge Advocate General of the Air Force, which offered to furnish the names and addresses of the survivors, undertook to make these witnesses available for pretrial depositions under the Rules at respondents' will and at Government expense, and guaranteed to authorize the witnesses to testify to all matters pertaining to the cause of the accident except as to classified material.

An amended order was then issued by the district judge (R. 28), to the effect that the Government should produce for examination by the court the documents in question, so that the court could determine whether the disclosure "would violate the Government's privilege against disclosure of matters involving the national or public interest." Compliance with this order was not forthcoming and the district judge thereupon issued an order, under Rule 37, *infra*, pp. 76-77, that the facts in plaintiffs' favor on the issue of negligence be taken as established (R. 29). Subsequently, on the basis of this order, after a hearing for the assessment

of damages, the court entered final judgment for the respondents (R. 32, 33).

The Court of Appeals affirmed (R. 44-58). It first upheld the District Court's determination that respondents had shown good cause for discovery and then proceeded to deal with the question of privilege (R. 48). It stated that Air Force regulations forbidding disclosure were not in issue because they applied only to subordinate employees of the Department, whereas the statute (R.S. 161) gave the Secretary himself power to disclose the documents; and a proper order directed against the United States would have the effect of compelling the Secretary personally to comply. Also on the ground that the order was directed against the United States and did not result in direct sanctions against the Secretary, the court held that it need not reach "difficult constitutional questions arising out of the separation of powers" which would have been presented most squarely if the District Court had issued an order directed to the Secretary (R. 49-50).

The propriety of avoiding this problem by an order directed against the United States the court upheld by deciding that the Tort Claims Act, in so far as it makes the Government liable "in the same manner * * * as a private individual" (28 U.S.C. 2674, *infra*, p. 75) and makes the Federal Rules applicable to suits under it, constitutes a waiver of whatever privilege might exist for the documents in other actions (R. 50-53).

After having thus disposed of the case by holding

that the privilege had been waived, the court went on to hold, despite the Secretary's affidavit to the contrary, that recognition of a privilege based on the asserted necessity of encouraging free discussion at investigations would be against public policy and that the Tort Claims Act must be read as offering the Government a categorical choice of either disclosing the documents or suffering judgment against it. Rejecting the contention that disclosure would affect military security, the court further stated that the question of the need for secrecy must be passed on by the trial judge after examining the documents *in camera*.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:—

1. In holding the report of the Air Force Accident Investigation Board and the statements of the witnesses before it not privileged against discovery;

2. In holding that the Government was properly barred from presenting evidence on the issue of negligence;

3. In holding that the Government was properly found negligent;

4. In holding that good cause was shown for ordering discovery of the documents;

5. In entering judgment for the respondents.

SUMMARY OF ARGUMENT

The decision below is an unwarranted interference with the powers of the executive, forcing the department head to choose whether to disclose pub-

lic documents contrary to the public interest, or to suffer the public treasury to be penalized. This forced choice is contrary to R.S. 161, to historic practice, and to the practical requirements of administration. *Touhy* v. *Ragen*, 340 U.S. 462, and *United States* v. *Cotton Valley Operators Committee*, 9 F. R.D. 719 (W.D. La.), affirmed *per curiam* by an equally divided court, 339 U.S. 940, dealt with related but distinguishable problems. It is the government's position (1) that the courts lack power to compel disclosure by means of a direct demand on the department head; (2) that the same result may not be achieved by the indirect method of an order against the United States, resulting in judgment when compliance is not forthcoming, and that Congress has not sanctioned such a procedure either in the Tort Claims Act or in the Federal Rules of Civil Procedure; and (3) that good cause for discovery, required by the Federal Rules to be shown, does not exist in the circumstances of this case.

I

Discovery under the Federal Rules is limited to matters "not privileged" and thus excludes material privileged by the Constitution, by statute, or by the common law. The documents in question are privileged within the meaning of this rule.

A. R. S. 161, which authorizes the head of a department to prescribe regulations for the custody, use, and preservation of records and which we regard as a statutory affirmation of a constitu-

tional privilege against disclosure, protects the executive against direct court orders for disclosure by giving the department heads sole power to determine to what extent withholding of particular documents is required by the public interest.

1. The constitutional privilege thus confirmed has a long history and has frequently been asserted against and recognized by both Congress and the courts. R. S. 161 asserts the executive's independence of Congress, as well as of the courts, in respect of departmental documents, representing in this regard a reversal of the parliamentary system of the Continental Congress and an implementation of the doctrine of separation of powers. The privilege recognized by it has been asserted against Congressional demands for the production of executive documents on numerous occasions, giving rise to important debates, one of which occurred as recently as 1948. These assertions of privilege have been uniformly successful, and the various Congresses have, even in the heat of contest, conceded their propriety.

2. The privilege claimed has also been asserted against demands by the courts for disclosure. These, too, have been successful, although usually the cases have not been pushed by either side to a final show of force. *Boske* v. *Comingore*, 177 U.S. 459, and *Touhy* v. *Ragen*, 340 U.S. 462, upheld one aspect of the privilege, holding that regulations under R. S. 161 validly protected subordinate officers of executive departments against demands for disclosure. Earlier examples, more directly appo-

site to the power of department heads to withhold production, include *Marbury* v. *Madison,* 1 Cranch 137, and Burr's trials, where counsel for the Government refused to divulge, in response to subpoenas, confidential portions of documents in the possession of the executive.

B. 1. Fourteen states have statutes forbidding disclosure of confidential communications to the executive when the public interest would suffer from disclosure; other states confer privilege on various specific classes of documents. The House of Lords, in a decision which should be given great weight, *Duncan v. Cammell, Laird & Co.,* [1942] A.C. 624, has held that ministers have sole power to decide whether disclosure should be made of departmental documents. In addition, there are well settled privileges for state secrets and for communications of informers, both of which are applicable here, the first because the airplane which crashed was alleged by the Secretary to be carrying secret equipment, and the second because the secrecy necessary to encourage full disclosure by informants is also necessary in order to encourage the freest possible discussion by survivors before Accident Investigation Boards.

2. The importance of encouraging free discussion, emphasized by the Secretary, should serve as a basis for the application of the informer's privilege in the circumstances of this case. This consideration has always caused Congress, whenever the situation was placed before it, expressly to recognize a privilege for reports of public accident in-

vestigations, as it has done in the Interstate Commerce and Civil Aeronautics Acts (with respect to commercial and private air crashes). It would certainly seem that investigations of military air accidents should be clothed with the same freedom from use in litigation.

C. The preceding subsections have set forth grounds on which the courts should reach the conclusion that the documents here involved are privileged. It leaves out of express consideration the decisive factor that the decision not to disclose is an administrative decision, delegated to the department heads by Congress in R.S. 161, as to which only the administrator can know all the relevant policy factors. The Secretary, basing his conclusions on the desirability of protecting witnesses in order that they might feel free to testify fully and, presumably, acting with full cognizance of the possible hardship to the respondents, has made an administrative determination. The courts should not interfere in such policy determinations without, at least, a showing that the executive determination is plainly arbitrary. No such reasons exist here, for, as noted, the Secretary's determination was clearly founded on adequate considerations.

II

Hence, the courts lack power to exert compulsion toward disclosure in the form of a direct demand on the department head. The court below, however, held that the Tort Claims Act was intended to permit avoidance of the executive privilege by

authorizing an order directed to the United States and resulting, should the department head fail to comply, in a bar order under Rule 37, forbidding the United States to contest the issue of negligence. But it is clear that nothing in the Tort Claims Act imposes on the department head any duty of disclosure or was designed to curtail the privilege.

A. The only relevant aspects of the Act are its provision for treating the United States like a private party (28 U.S.C. 1346, 2674), and the provision making the Federal Rules applicable to actions under the Act. The Rules themselves exempt privileged matter from discovery, and their legislative history makes clear that the term "privilege" includes governmental privilege. The "private party" language of the Tort Claims Act appears to deal only with substantive liability, not with procedure. And no reference is made in the Act or its legislative history to R.S. 161 or to the long history of executive privilege, of which Congress must have been aware. It is most unlikely that Congress meant to override this long-standing privilege, *sub silentio,* even assuming that it had power to do so.

Nor can the Government be likened to a private party, because its claim of privilege is made in the *public* interest. In determining where the public interest lies, the Secretary may be presumed to balance the interest in secrecy against the interest in unhampered litigation by the parties. Moreover, the Federal Rules forbid default judgments against the United States, and the bar order in

this case is, in effect, the equivalent of defaulting the Government. The prohibition of such defaults further negates the possibility of likening the Government to a private person in this situation.

B. Since nothing in the Act or the Federal Rules seeks to withdraw the executive's privilege, the question remains whether the courts below have improperly violated the privilege. This they have done because they have exerted undue compulsion on the Secretary to disclose. The Secretary has been faced with the inadmissible alternative of surrendering documents which must be kept secret, or of causing the Government to be subjected to a large judgment without any proof of liability. The judgment is in effect a penalty on the Government for the Secretary's choice not to disclose.

This penal aspect distinguishes the case in which the Government is plaintiff (*United States* v. *Cotton Valley Operators Committee*, 9 F.R.D. 719 (W.D.La.), affirmed *per curiam* by an equally divided court, 339 U.S. 940) from the present situation, since, in the former, not only does the choice of evils arise less fortuitously, but the election not to disclose leaves the public no worse off than if the action had never been brought.

III

The courts below erred in holding that respondents showed good cause for discovery, as required by Rule 34. The showing of cause was in general terms and the decision was based on the view that the taking of depositions and the use of other avail-

able discovery machinery would be too burdensome on respondents. Counterbalancing these factors, however, was the Government's offer to produce the survivors as witnesses at its own expense and at the respondents' convenience, and to guarantee their testifying on all but classified matters. Furthermore, where substantial reasons of public policy militate against disclosure, an even greater showing of cause than usual is required. Cf. *Hickman v. Taylor*, 329 U.S. 495. The importance of disclosure to the plaintiffs, who had other sources for the same information, is far less than the importance of the principle of deference to a well-founded claim of executive privilege.

ARGUMENT

This case presents the question whether the judiciary can compel executive officials to disclose, in the course of litigation, departmental documents which the officials believe should be withheld in the public interest. The court below, seeking to avoid this ultimate issue by formally disclaiming direct action against the official, has nevertheless erred in permitting an unwarranted encroachment upon the powers of the executive by penalizing the treasury of the United States. The effect of the decision below inevitably must be to exert coercive pressure on departmental officials to disclose documents and records, the disclosure of which they, as the responsible constitutional officers, have determined to be inimical to the public interest.

Our position is that under the doctrine of separation of powers and under the statute imple-

menting this doctrine the courts have no power to compel the heads of the executive departments to produce such documents, and that the attempt below to compel disclosure by offering the executive the Hobson's choice of producing, contrary to the public interest, or of suffering the public treasury to be amerced by judgment against the United States is likewise invalid. This position is based in part upon R.S. 161 (5 U.S.C. 22), which represents a legislative implementation of the doctrine of separation of powers. It is in part based upon the historic development of executive-judicial practice and on practical considerations of administration which underlie related doctrines of governmental privilege in the general law of evidence. It is also in part based on the total absence from the background and terms of the Tort Claims Act of any suggestion that Congress wished, if it could, to override this history, doctrine, and practice.

Aspects of the question presented here have recently been before this Court in *Touhy* v. *Ragen*, 340 U.S. 462, and in *United States* v. *Cotton Valley Operators Committee*, 9 F.R.D. 719 (W.D. La.), affirmed *per curiam* by an equally divided court, 339 U.S. 940, but both of these were significantly different. *Touhy* v. *Ragen* upheld the power of department heads to promulgate regulations pursuant to R.S. 161, similar to those in the present case, forbidding disclosures; but that case did not reach the question whether the courts had power to coerce the department head who promulgates such regulations to make disclosure. *Cotton Val-*

ley concerned the power of the courts to compel production of documents where the Government, acting through the department head involved, initiated the action. Without at all conceding that the District Court's decision in that case was correct, we may point out that where the Government is plaintiff, as in criminal cases where it is prosecutor,[4] the choice of seeking the aid of the courts by pursuing the action or of refusing to produce is different from that where the Government is defendant. If the Government refuses to produce in the former class of cases, it is denied judicial assistance; but the public is left in no worse position than if it had never instituted the action. Hence, the result in *Cotton Valley* does not reach the situation presented in the present case, where the public treasury is the actual defendant. Here, the executive does not choose to be sued in the particular case, and indeed the United States need never have consented to be sued at all; yet an election not to produce, made by the Secretary of the Air Force independently of the litigation, results in a substantial money penalty against the public treasury. The coercive effect of the alternative, though it may be somewhat less than that of compulsion by direct process against the executive officer involved, is still great enough to force production in all but the gravest of cases.

The court below read the Tort Claims Act and, through it, the Federal Rules as authorizing this coercion; but nothing in either the Act or the Rules can fairly be read as expressing an inten-

[4] See fn. 42, *infra*, p. 67.

tion to abrogate the express and long-standing privilege of the executive. Congress was cognizant of a long history—starting from the early days of the Republic—of conflict between the executive, on the one hand, and Congress and the courts, on the other, in which conflict the executive repeatedly asserted and vindicated its privilege. Beneath this history lay tacit assumptions of the nature of our form of government. It is most unlikely that Congress—aware as it was of this history and its assumptions—intended, without an express word in the Tort Claims Act or its legislative history, to punish the United States should the executive proceed in the historic way. And the Federal Rules make express provision for the very privilege here involved.

In this brief, we shall first show, from the source, history, and nature of the executive's assertion of power to determine the privilege for departmental documents, that the papers in question are privileged and that the courts lack power to compel their disclosure. Next, we shall show that nothing in the Tort Claims Act or the Rules of Civil Procedure confers on the courts the power to punish the United States by the means adopted below for the executive's assertion of this historic privilege, and that the decision below erroneously upholds an unwarranted interference with a privilege recognized by the Rules. Finally, we shall show that, apart from privilege, good cause for discovery has not been shown in the circumstances.

I

The Report of the Air Force Accident Investigation Board and the Statements of Witnesses Before the Board Are Privileged Against Discovery

Although the privilege asserted in this case has its ultimate source in the Constitution, it may be reached first at a lower level as a problem of statutory construction or of the common law of evidence. Federal Rule 34, *infra*, pp. 75-76, under which the District Court proceeded, authorizes a court to order production of documents and other tangible things "not privileged." Discovery under Rule 34 therefore does not extend to any matter which is privileged by the Constitution, by statute, or by the common law.[5] We shall show that the privilege claimed for reports of aircraft accident investigation boards, and for the testimony of witnesses before them, thus falls within the exception of Rule 34.

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[5] The term "privilege" in Rule 34 has primary reference to matters which fall within the scope of recognized evidentiary privileges such as the privilege against self-incrimination (based on the Constitution), that for communications between physician and patient (based on statute), or that for communications between husband and wife or attorney and client (based on the common law). However, privilege under Rule 34 is not limited to such recognized evidentiary privileges. See *Hickman* v. *Taylor*, 153 F. 2d 212, 222 (C.A. 3), affirmed, 329 U.S. 495. On the other hand, privilege does not extend to all matters incompetent as evidence for reasons (such as the hearsay rule) other than the recognized privileges. See *Hickman* v. *Taylor*, 329 U.S. at 511; *Bank Line Ltd.* v. *United States*, 163 F. 2d 133, 137 (C.A. 2). We think that the accident investigation reports here in question are both incompetent and privileged. Cf. *Chapman* v. *United States*, 194 F. 2d 974 (C.A. 5), now pending on petition for a writ of certiorari, No. 105, this Term. But we do not contend that they are privileged simply because they are incompetent.

A. *R.S. 161 Vests in the Secretary of the Air Force the Power to Determine Finally That the Documents in Question Are Privileged.*

R.S. 161, 5 U.S.C. 22, *infra*, p. 75, authorizes the head of each executive department "to prescribe regulations, not inconsistent with law, for * * * the custody, use, and preservation of the records, papers, and property appertaining to it." The Secretary of the Air Force has exercised this authority by promulgating Air Force Regulation No. 62-7, *infra*, pp. 78-81, pertaining to the records of accident investigations, which prohibits their disclosure by department personnel "without the specific approval of the Secretary."

Similar regulations, restricting various documents and records from disclosure except as authorized by the department head personally, have long existed in many executive departments and bureaus. Their validity under the statute has been completely established by *Boske* v. *Comingore*, 177 U.S. 459, and *Touhy* v. *Ragen*, 340 U.S. 462. These cases both held that the regulation provides a valid defense for an inferior officer of the department governed by it against punishment for defiance of a court order directing disclosure.[6] The question now to be considered is the question left open by

[6] Lower court cases taking the same view in related situations include the following: *Ex parte Sackett*, 74 F. 2d 922 (C.A. 9); *In re Valecia Condensed Milk Co.*, 240 Fed. 310 (C.A. 7); *Walling* v. *Comet Carriers*, 3 F.R.D. 442 (S.D. N.Y.); *Federal Life Ins. Co.* v. *Holod*, 30 F. Supp. 713 (M.D. Pa.); *Stegall* v. *Thurman*, 175 Fed. 813 (N.D. Ga.); *In re Lamberton*, 124 Fed. 446 (W.D. Ark.). *In re Weeks*, 82 Fed. 729 (D. Vt.), and *In re Huttman*, 70 Fed. 699 (D. Kans.) reached the same result before the decision in *Boske* v. *Comingore*.

Touhy v. *Ragen* (340 U.S. at 467, 470)—whether the department head who issues the regulation may personally decline to comply with an order directing disclosure.

Clearly, the regulation so contemplates. "Reports * * * will not be furnished * * * without the specific approval of the Secretary" (Section 5). "Responsibility for the release * * * will rest solely with the Secretary" (Section 6). The assertion of privilege made in the District Court was an exercise of that sole responsibility. Any attempt by a court to compel the Secretary to exercise this power in a manner prescribed by the court and contrary to his own judgment is a derogation from this power.

The regulation apart, the underlying statute confirms such a power in the department head. The court below appears to have thought erroneously that R.S. 161 has no application in cases where the courts, pursuant to their enforcement of provisions of substantive law, require the agency head to exercise his power under the regulation to authorize disclosure. But the history of R.S. 161 makes it clear that this statute is not merely a provision for the internal administration of government agencies. Rather, it was intended as a confirmation of independent authority, a statutory implementation of the constitutional independence of the executive.

1. *Privilege against demands by Congress.* R.S. 161 stems directly from the original organic acts establishing the executive departments (1 Stat. 28, 49, 65, 68, 553), and it embodies a recognition of their independence of both Congress and the

courts.[7] The privilege which it confers in this case derives from the same constitutional source as, and closely parallels, the executive privilege which has consistently and successfully been asserted in response to Congressional attempts to require production by the executive branch, often of the very type of documents involved in this case. Because of this close parallel, we wish to make some reference to the field of executive-legislative relations, before coming to the executive-judicial field. As we shall show, consideration of the former area casts light on the meaning and scope of R.S. 161.

There is further reason for referring in this case to the executive's privilege against the legislature.

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[7] Congressional independence as against the judiciary is also asserted. For a recent instance, see 96 Cong. Rec. 565-66 (H. Res. 427, 81st Cong., 2d Sess.): "* * * *Resolved*, That by the privileges of this House no evidence of a documentary character under the control and in the possession of the House of Representatives can, by the mandate of process of the ordinary courts of justice, be taken from such control or possession but by its permission * * *." 96 Cong. Rec. 1400; see on subsequent subpoena, H. Res. 465, 96 Cong. Rec. 1695; H. Res. 469, 96 Cong. Rec. 1765. Cf. *Trial of Thomas Cooper*, Wharton's State Trials of the United States 659, 662: "An application was made to the court to address a letter to the Speaker of the House, requesting him to have process served. This Judge Peters acceded to, as the proper course. It was refused, however, by Judge Chase, who ordered process to issue without such letter, saying, at the same time, that if it was necessary to compel the attendance of the members, the case would be continued until the session was over. The court at the same time refused to permit a subpoena to issue directed to the President of the United States. * * *

"* * * After some difficulty in obtaining the attendance of the members of Congress who were subpoenaed, *which appears ultimately to have been given under a waiver of the supposed privilege*; * * * the jury was sworn * * *." *Id.* at 662. Wigmore seeks to distinguish between the privilege against appearing to give testimony and the privilege against producing documents. See 8 Wigmore, *Evidence* (3d Ed. 1940) §§ 2367, 2371.

The reason is that the long history of assertions of executive privilege in this field has continually brought before the eye of the legislature the assumptions as to the nature of the separation of powers on which the executive's claims have been based. And it is not likely that Congress meant, *sub silentio,* in the Tort Claims Act to override these deep-rooted assumptions.

The frequently exercised, long-standing freedom of the executive to refuse Congress' demands for the production of documents does not require extended discussion. Under the Continental Congress, the relationship between legislature and executive had been modeled on the British system. The executive departments were, in effect, answerable to the legislature, and could be called on for an accounting. A resolution of the Continental Congress creating the Department of Foreign Affairs, whose head was appointed by and held office at the pleasure of Congress, provided:

> That the books, records and other papers of the United States, that relate to this department, be committed to his custody, to which, and all other papers of his office, any member of Congress shall have access; provided that no copy shall be taken of matters of a secret nature without the special leave of Congress. [22 *Journals of the Continental Congress* 87-92 (1782).]

The complete change wrought by the Constitution in establishing the three independent branches (The *Federalist*, Nos. XLVII, XLVIII) was reflected in R.S. 161 and its predecessors. See Wol-

kinson, *Demands of Congressional Committees for Executive Papers* (1949), 10 Fed. Bar J. 319, 328-330. We do not contend that this statute, the substance of which appears in the original organic act of each department, was an express enactment directed at *creating* an evidentiary privilege. Rather, it wove into the fabric of each department the premise of separation of powers on which the whole Government was formed.

Since then there has arisen an often asserted, much discussed, and well recognized privilege of the executive to deny Congress access to documents whenever either the President or the head of a department has deemed it in the public interest to do so. From the administration of Washington to the present, Presidents have repeatedly asserted the privilege, and, when forced to a showdown, Congress has always yielded and ceased to press its demands.[8] A recent instance was the refusal of

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[8] The following is a partial list of examples of successful assertions of the privilege, comprising partly assertions by the President and partly assertions by department heads (see *infra*, pp. 31-34):

President	Date	Type of Information Refused
Washington	1796	Instructions to U. S. Minister concerning Jay Treaty.
Jefferson	1807	Confidential information and letters relating to Burr's conspiracy.
Monroe	1825	Documents relating to conduct of naval officers.
Jackson	1833	Copy of paper read by President to heads of Departments relating to removal of bank deposits.
	1835	Copies of charges against removed public official.
		List of all appointments made without Senate's consent between 1829 and 1836, and those receiving salaries, without holding office.
Tyler	1842	Names of members of 26th and 27th Congress who have applied for office.

President Truman to turn over to the House Committee on Un-American Activities files relating to the federal employee loyalty program. Directive of March 13, 1948, 13 F.R. 1359.

Reference to the unbroken record of successful

President	Date	Type of Information Refused
Tyler	1843	Colonel Hitchcock's report to War Department dealing with alleged frauds practiced on Indians, and his views of personal characters of Indian delegates.
Polk	1846	Evidence of payments made through State Department on President's certificates, by prior administration.
Fillmore	1852	Official information concerning proposition made by King of Sandwich Islands to transfer Islands to U. S.
Buchanan	1860	Message of Protest to House against Resolution to investigate attempts by Executive to influence legislation.
Lincoln	1861	Dispatches of Major Anderson to the War Department concerning defense of Fort Sumter.
Grant	1876	Information concerning executive acts performed away from Capitol.
Hayes	1877	Secretary of Treasury refused to answer questions and to produce papers concerning reasons for nomination of Theodore Roosevelt as Collector of Port of New York.
Cleveland	1886	Documents relating to suspension and removal of 650 Federal officials.
Theodore Roosevelt	1909	Attorney General's reasons for failure to prosecute U. S. Steel Corporation.
		Documents of Bureau of Corporations, Department of Commerce.
Coolidge	1924	List of companies in which Secretary of Treasury Mellon was interested.
Hoover	1930	Telegrams and letters leading up to London Naval Treaty.
	1932	Testimony and documents concerning investigation made by Treasury Department.
Franklin D. Roosevelt	1941	Federal Bureau of Investigation reports.
	1943	Director, Bureau of the Budget, refused to testify and to produce files.
	1943	Chairman, Federal Communications Comm., and Board of War Communications refused records.
	1943	General Counsel, Federal Communications Commission, refused to produce records.
	1943	Secretaries of War and Navy refused to furnish documents, and permission for Army and Naval officers to testify.
	1944	J. Edgar Hoover refused to give testimony and to produce President's directive.

assertions of privilege in practice is particularly significant in this area of separation of powers. In the construction of any clause of the Constitution uninterrupted usage continuing from the early days of the Constitution would be significant. "Both officers, lawmakers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation." *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 472-473; *United States* v. *Macdaniel*, 7 Pet. 1, 13-14. Here, moreover, because the doctrine of separation of powers is not contained in express language in the Constitution (see *Ex parte Grossman*, 267 U.S. 87, 119), and because the functioning of our Government depends so largely upon limits on the powers of each branch derived from practical adjustments based on a fair regard by each for the necessities

President	Date	Type of Information Refused
Truman	1945	Issued directions to heads of executive departments to permit officers and employees to give information to Pearl Harbor Committee, but the President's directive did not include any files or written material.
	1947	Civil Service Commission records concerning applicants for positions.

See Wolkinson, *Demands of Congressional Committees for Executive Papers*, 10 Fed. Bar J. 103, 147.

of the others, we think that the historic usage is especially meaningful. "Even constitutional power, when the text is doubtful, may be established by usage." *Inland Waterways Corp.* v. *Young*, 309 U.S. 517, 525.[9]

These successful executive assertions of privilege against Congress have frequently been acknowledged by Congress itself. See, *e.g.*, H. Rept. No. 1595, 80th Cong., 2d Sess., pp. 2-3, 7. Even in the heat of contest members of Congress have recognized the wisdom of acceding to the constitutional principles here asserted.

During the administration of President Hayes, for example, the House Judiciary Committee, under the chairmanship of Benjamin F. Butler, pointed out that all resolutions directed to the President relating to the production of records properly would contain the clause "if in his judgment not inconsistent with the public interest." H. Rept. No. 141, 45th Cong., 3rd Sess., p. 3. And the Committee continued (*id.* at pp. 3 and 4):

> * * * whenever the President has returned (as sometimes he has) that, in his judgment, it was not consistent with the public interest to give the House such information, no further proceedings have ever been taken to compel the production of such information. Indeed, upon principle, it would seem that this must be so. The Executive is as independent

[9] In *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, the Court did not deny this principle but felt that sufficient practice had not been shown or that it had been changed by specific legislation.

> of either house of Congress as either house of Congress is independent of him, and they cannot call for the records of his action or the action of his officers against his consent, any more than he can call for any of the journals and records of the House or Senate.

The decision as to whether there should be compliance with a particular request was the executive's, the committee stated:

> Somebody must judge upon this point. It clearly cannot be the House or its committee, because they cannot know the importance of having the doings of the executive department kept secret. The head of the executive department, therefore, must be the judge in such case and decide it upon his own responsibility to the people, and to the House, upon a case of impeachment brought against him for so doing, if his acts are causeless, malicious, wilfully wrong, or to the detriment of the public interests.

There are many other instances of Congressional recognition of the executive privilege, *vis à vis* Congress, including one which gave rise to a great Congressional debate, occupying the Senate for almost two weeks, during President Cleveland's first administration. 17 Cong. Rec. 2211-2814. See Sen. Misc. Doc., Vol. 7, 52d Cong., 2d Sess., pp. 235-243; 8 Richardson, *Messages and Papers of the Presidents*, pp. 375-383; 17 Cong. Rec. 4095. In the course of this debate many past examples of executive refusals to produce papers demanded by

Congress were discussed. See, *e.g.*, 17 Cong. Rec. 2622-2623.[10]

Particularly illuminating is Congress's reaction to the President's Directive of March 13, 1948 (13 F.R. 1359), relating to the loyalty program. At that time, a joint resolution was introduced (H.J. Res. 342, 80th Cong., 2d Sess.) purporting to direct all executive departments and agencies to make available to Congressional committees any information deemed necessary to the committees for the performance of their work.

This resolution was opposed on the ground that it was unconstitutional. A strong minority report was filed in the House, which stated in part:

> The majority report recognizes that this issue between the executive and the legislative branch is not a new one, but has been raised periodically, over the entire history of our Government and without regard to the political affiliations of the respective Presidents or the political complexions of the Congresses whose authority in this regard the Presidents challenged. There can be no disputing this fact. There have been made from time to time over the period of our country's history requests and demands upon the executive branch of our Government by the Congress or its committees seeking information, to reveal which, in the opinion of the executive branch, would have been inconsistent with its duties in this

[10] This debate ended with the approval by the Senate, in a vote on party lines, of resolutions condemning the President and the Attorney General. No result came from the resolutions. See 17 Cong. Rec. 2813-2814.

> regard. On such occasions the executive branch, as a matter of history, as a matter of tradition, and as a matter of constitutional prerogative, has declined to comply with such requests or demands. Over the years, President after President has asserted his prerogative in this respect. By now it is well established that under our tripartite form of government neither the legislative nor the judicial branches may question the Executive with respect to matters within his province and as to which he, the Executive, determines that response to the questions would be contrary to the public interest. [H. Rept. No. 1595, 80th Cong., 2d Sess., p. 7.]

The resolution was ultimately passed by the House but died in the Senate Committee on Expenditures in the Executive Departments. Thus, Congress forebore to assert directly even for its own purposes what the court below contends it has asserted indirectly for private litigants.

2. *Privilege against demands by courts.* While it may be suggested that there are differences in the force of the privilege when it touches the interest of parties to a judicial proceeding, as compared with the executive's relations with Congress,[11] we

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[11] But see the views of Senator Jackson, later to become an associate Justice of this Court (17 Cong. Rec. 2623):

"Sir, has this body, has the Congress of the United States any more authority over papers in the Executive Department of this Government than the co-ordinate independent branch of the Government—the judiciary? The judicial department of this Government has as much power and authority over all papers in the hands of the Executive or in any Department as the entire Congress has. When the rights of in-

think that the history in the two fields is so interwoven as to make the parallel apt. The executive's claim of independence of the courts is well established; and although occasions for its assertion have been less frequent than those against Congress, the pattern is clear.

Reference has already been made to this Court's decision in *Boske* v. *Comingore*, 177 U.S. 459, and the cases in which it has been followed. These establish the executive's power to refuse disclosure at least until demand is made by the courts on the department head himself.[12] And, to the extent that courts have dealt with the problem, the power of the executive department head has been asserted and acknowledged. In *Marbury* v. *Madison*, 1 Cranch 137, Attorney General Lincoln, appearing as a witness, objected to answering certain questions concerning the disposition of Marbury's commission. "On the one hand, he respected the

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dividuals, affecting their life, liberty, or property, are pending before the courts, the judicial department has as much power over papers as the Senate or the whole Congress; and yet it has been universally recognized from the very foundation of this Government that the judicial department of the Government can not call for papers and procure them either from the President or the head of an Executive Department at its own will, but that the discretion rests with the Executive and with the Departments how far and to what extent they will produce those papers."

[12] Though this Court, in the *Boske* case, seemed to stress the power of the department head to center the responsibility for disclosure in himself, it characterized as "elaborate and able" (177 U.S. at 467) the district court's opinion which goes on much broader grounds. The lower court appears to have been of the view that not even the Secretary of the Treasury could be compelled to produce the documents. See *In re Comingore*, 96 Fed. 552, 562 (D. Ky.).

jurisdiction of this court, and on the other, he felt himself bound to maintain the rights of the executive." 1 Cranch at 143. The Court said, "They had no doubt he ought to answer. There was nothing confidential required to be disclosed. *If there had been, he was not obliged to answer it; and if he thought that anything was communicated to him in confidence, he was not bound to disclose it* * * *." 1 Cranch at 144 (italics supplied). Lincoln at a later time answered substantially all of the questions. 1 Cranch at 145.

When sitting on Burr's trial, Chief Justice Marshall issued a subpoena to President Jefferson for the production of a letter sent by General Wilkinson to the President, which Burr alleged contained information vital to his defense. Jefferson ignored the subpoena and directed the United States Attorney to produce only such portions of the letter as were not confidential. 1 Robertson, *Burr's Trials* 177, 180, 186-188 (1808); 1 Dillon, *Marshall: Life, Character, Judicial Services* XLVI-XLIX (1903); 9 Ford, *Writings of Thomas Jefferson* 55-57, 62 (1898). The court avoided the ultimate test of power with the executive.

After Burr was acquitted of treason, he was tried again on a statutory charge. Again he demanded the Wilkinson letters, and United States Attorney Hay insisted that some of the matter in the letters ought not to be disclosed. At one point Hay intimated that he would show the letter to the court and not to the defendant, but at another he inti-

mated that he would ignore a subpoena *duces tecum*. 2 Robertson, *Burr's Trials* 511. Jefferson also wrote to Hay, saying that if the Chief Justice sought to issue a subpoena, the United States marshal would be wise not to try to enforce it, and that he, Jefferson, would protect the marshal. 9 Ford, *Jefferson's Writings* 62. Of especial significance for this case is the fact that it appears that the privilege was available not only to the President but also to department heads. Apparently the subpoena issued from the district court was directed to both the President and the Secretaries of War and the Navy. Neither attended, and Jefferson stated that the only information within their knowledge that would be given to the court, he himself would give on deposition.[12a]

Every Attorney General considering the problem has been of the opinion that information of which disclosure would be detrimental to the public interest is privileged, and that the determination of the executive is conclusive. 11 Ops. A.G. 137, 142-143; 15 Ops. A.G. 378; 16 Ops. A.G. 24;

[12a] "In no case of this kind would a court be required to proceed against the president, as against an ordinary individual. The objections to such a course are so strong and so obvious; that all must acknowledge them." Chief Justice Marshall in 2 Robertson, *op. cit. supra*, p. 536. Burr's trial is the only case in which a court has issued a subpoena to the President. In other cases even the issuance of the subpoena, either to the President or to department heads, has been refused. *E.g., Trial of Thomas Cooper*, Wharton's State Trials of the United States 659, 662; *Smith's & Ogden's Trial*, Lloyd's Rep. 2, 7, 13, 89.

25 Ops. A.G. 326; 40 Ops. A.G. 45, 49.[13] Attorney General Jackson has said (40 Ops. A.G. 45, 49):

> This discretion in the executive branch has been upheld and respected by the judiciary. The courts have repeatedly held that they will not and cannot require the executive to produce such papers when in the opinion of the executive their production is contrary to the public interests. The courts have also held that the question whether the production of the papers would be against the public interest is one for the executive and not for the courts to determine. *Marbury* v. *Madison*, 1 Cranch 137, 169; *Totten* v. *United States*, 92 U.S. 105; *Kilbourn* v. *Thompson*, 103 U.S. 168, 190; *Vogel* v. *Gruaz*, 110 U.S. 311; *In re Quarles and Butler*, 158 U.S. 532; *Boske* v. *Comingore*, 177 U.S. 459; *In re Huttman*, 70 Fed. 699; *In re Lamberton*, 124 Fed. 446; *In re Valecia Condensed Milk Co.*, 240 Fed. 310; *Elrod* v. *Moss*, 278 Fed. 123; *Arnstein* v. *United States*, 296 Fed. 946; *Gray* v. *Pentland*, 2 Sergeant & Rawle's (Pa.) 23, 28; *Thompson* v. *German Valley R. Co.*, 22 N.J. Equity 111; *Worthington* v. *Scribner*, 109 Mass. 487; Ap-

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[13] Accord: American Law Institute, *Model Code of Evidence* (1942), Rule 288; 1 Greenleaf, *Evidence* (1899 Ed.), Sec. 251; 3 Jones, *Evidence* (4th Ed., 1938) Sec. 762. See also the cases cited in fn. 41, *infra*, p. 66. Wigmore has been of the contrary view (8 Wigmore, *Evidence* (3d Ed. 1940) Sec. 2378a) since 1905 (1905 Ed., Sec. 2375)), although he recognizes a privilege for communications by informer and a limited class of state secrets, not clearly defined.

peal of Hartranft, 85 Pa. 433, 445; 2 *Burr Trials*, 533-536; see also 25 Op. A.G. 326.[14]

Viewed in the light of this long history of executive independence in practice, and of the courts' and Congress's recognition of this principle, R.S. 161 can only be read as a statutory embodiment and recognition of the authority of the department heads to formalize the procedure whereby they determine, in the discharge of their duties, what to disclose and what to withhold. We turn now to additional considerations of public policy, recognized by the common law, which support this view of the law and which privilege the documents against discovery.

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[14] "* * * Such order ought not to be made against the Executive of the state, because it might bring the Executive in conflict with the judiciary. If the Executive thinks he ought to testify, in compliance with the opinion of the court, he will do it without an order; if he thinks it to be his official duty, in protecting the right and dignity of his office, he will not comply even if directed by an order * * *." *Thompson v. German Valley Railroad Co.*, 22 N.J. Eq. 111, 114.

"* * * [T]he President of the United States, the governors of the several states and their cabinet officers, are not bound to produce papers or disclose information committed to them, in a judicial inquiry, when, *in their own judgment*, the disclosure would, on public grounds, be inexpedient: 1 Greenf. on Ev., § 251; 1 Whart. Law of Ev., § 604. Thus, the question of the expediency or inexpediency of the production of the required evidence is referred, not to the judgment of the court before which the action is trying, but of the officer who has that evidence in his possession * * * as judicial inquiry must always be public, the preliminary examination must give to the document that very publicity which it might be important to prevent * * *." *Appeal of Hartranft*, 85 Pa. 433, 445, 447 (italics supplied).

B. *The Power of the Secretary to Determine Finally That the Documents in Question Are Privileged Is Supported by Considerations of Public Policy Recognized by the Common Law.*

In determining what materials are "privileged" within the meaning of Rule 34, reliance may be placed not only on privilege based on the Constitution and statute, as has been done so far in this brief, but also on privilege based on considerations of public policy expressed in the common law. State statutes and decisions and cases in other jurisdictions help to articulate these considerations. Among the categories of public policy recognized in this way by the law are the interest in efficient administration free from interference; the interest in secrecy in matters of foreign policy, security and national defense;[15] the interest in protecting communications of informants to officials;[16] and the interest in shielding witnesses from undue influence before trial; as well as the constitutional doctrine of separation of powers with

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[15] Thus, in actions between private parties, Government officials as witnesses have asserted a privilege against disclosure of confidential military matter. The privilege is the Government's, not the party's. *Firth Sterling Steel Co.* v. *Bethlehem Steel Co.*, 199 Fed. 353 (E.D. Pa.); *In re Grove*, 180 Fed. 62 (C.A. 3); *Pollen* v. *Ford Instr. Co.*, 26 F. Supp. 583 (E.D. N.Y.). Compare *Totten* v. *United States*, 92 U.S. 105, in which an action on a contract for espionage made with President Lincoln was held not to lie, on the ground that such a contract was so confidential that public policy would not permit action to be brought on it.

[16] See *infra*, p. 43.

which the preceding subsection of this brief was largely concerned.[17]

1. *State statutes and common law decisions:*— The privileged nature of information acquired by public officials has been recognized by the states in a variety of statutes protecting the confidence of communications or government documents. Some fourteen states have enacted statutes providing in general terms that a public officer cannot be examined as to communications made to him in official confidence, when the public interest will suffer by disclosure.[18] In addition, many statutes dealing with narrower classifications of official information have been enacted; among these are statutes relating to police reports of highway accidents, tax returns, reports submitted in compliance with banking loans, health reports, and many others.[19]

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[17] President Truman's Directive of March 13, 1948, forbidding disclosure of records of the employee loyalty program, relied on a number of these grounds. The Directive recited that "This is necessary in the interest of our national security and welfare, to preserve the confidential character and sources of information furnished, and to protect Government personnel against the dissemination of unfounded or disproved allegations." 13 F. R. 1359.

[18] Calif. Code Civ. Proc. Ann. § 1881 (5) (1941); Idaho Code Ann. § 9-203 (1948); Code of Iowa § 622.11 (1946); Minn. Stat. Ann. § 595.02 (5) (West 1947); Mont. Rev. Code Ann. § 10536 (5) (1935); Neb. Rev. Stat. § 25-1208 (1948); Nev. Comp. Laws Ann. § 8975 (1929); N. D. Rev. Code § 31-0106 (1943); Ore. Comp. Laws Ann. § 3-104 (5) (1940); S. D. Code § 36.0101 (5) (1939); Utah Code § 104-49-3 (1943); Wash. Rev. Stat. Ann. § 1214 (5) (1932); and see Colo. Stat. Ann. Ch. 177 § 9 (1949); Ga. Code Ann. § 38-1102 (1937).

[19] For a general survey and discussion of state legislation, see Sanford, *Evidentiary Privileges against the Production of Data Within the Control of Executive Departments*, 3 Vanderbilt L. Rev. 73, 82 (1949); Note, 165 A.L.R. 1302.

The validity of such legislation forbidding disclosures of information by public officials has been upheld by the state courts.[20] The variation in wording and coverage of particular statutes prevents any generalization as to the scope and effect of such legislation. It may be said, however, that the widespread pattern of legislation imposing restrictions upon free disclosures of this type of information indicates an accepted public policy as well as a recognition of the principles of the earlier court decisions and of the traditional American doctrine that the executive is independent.

Great weight should also be given to the decision in *Duncan* v. *Cammell, Laird & Co.*, [1942] A.C. 624, in which the House of Lords reached the result urged by the Government here. In that case, which arose out of the sinking of the submarine *Thetis*, discovery was sought of the plans and construction contracts of the submarine. The House of Lords held that discovery could not be obtained. "The principle to be applied in every case is that documents otherwise relevant and liable to production

[20] *Appl. of Manufacturers Trust Co.*, 269 App. Div. 108, 53 N.Y.S. 2d 923 (1945); *Oklahoma Tax Comm.* v. *Clendinning*, 193 Okla. 271, 143 P. 2d 143 (1943); *Hickok* v. *Margolis*, 221 Minn. 480, 22 N.W. 2d 850 (1946); *Fleming* v. *Superior Court*, 196 Cal. 344, 238 Pac. 88 (1925); *Thaden* v. *Bagan*, 139 Minn. 46, 165 N.W. 864 (1917); *Peden* v. *Peden's Adm'r.*, 121 Va. 147, 92 S.E. 984 (1917); *In re Herrnstein*, 20 Ohio Ops. 405, 6 Ohio Supp. 260 (1941); *Maryland Casualty Co.* v. *Clintwood Bank*, 155 Va. 181, 154 S.E. 492 (1930); *Samish* v. *Superior Court*, 28 Cal. App. 2d 685, 83 P. 2d 305 (1938); *Leave* v. *Boston El. Ry. Co.*, 306 Mass. 391, 28 N.E. 2d 483 (1940); *Dwelly* v. *McReynolds*, 6 Cal. 2d 128, 56 P. 2d 1232 (1936); *Simonsen* v. *Barth*, 64 Mont. 95, 208 Pac. 938 (1922). Contra: *In re French*, 315 Mo. 75, 285 S.W. 513 (1926).

must not be produced if the public interest requires that they should be withheld." [1942] A.C. at 636. And the sole arbiter of when the public interest so requires is the cabinet minister who heads the department to which the documents belong. Although the action was between private parties, the Lords held that no distinction was to be made, for suits against the Government, and in fact stated that when the Crown is a party it may not be required to give discovery at all. [1942] A.C. at 632.[21]

The House of Lords looked carefully into the question whether the departmental determination should be conclusive. The judgment of the Lord Chancellor (Viscount Simon), speaking for all the Law Lords, said ([1942] A.C. 624, 638):

> The essential matter is that the decision to object should be taken by the minister who is the political head of the department, and that he should have seen and considered the contents of the documents and himself have formed the view that on grounds of public interest they ought not to be produced, either because of their actual contents or because of the class of documents, *e.g.*, departmental minutes, to which they belong.

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[21] "The importance of *Duncan* v. *Cammell, Laird & Co.* * * * is marked by the fact that seven members of the House of Lords sat to hear the appeal. Moreover, the unusual course was followed of delivering only a single judgment which was prepared by the Lord Chancellor after 'consultation with and contribution from' the other learned Lords." 58 L.Q. Rev. 436. The decision disapproves the decision of the Judicial Committee of the Privy Council in *Robinson* v. *State of South Australia*, [1931] A.C. 704.

And, after reviewing the cases, and quoting among others the statement of Lord Kinnear in *Admiralty Commissioners* v. *Aberdeen Steam Trawling & Fishing Co.*, [1909] Sess. Cas. 335—"A department of Government to which the exigencies of the public service are known as they cannot be known to the Court, must, in my judgment, determine a question of this kind for itself * * *,"[22]—the Lord Chancellor states that the executive determination of privilege is conclusive on the court.

The Lord Chancellor goes on to lay down standards on which the minister should base his executive determination, mentioning, among others, situations where "disclosure would be injurious to national defence * * *" or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service." [1942] A.C. at 642.[23] These are the factors on which

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[22] Compare *Rex* v. *Davies*, [1945] 1 K.B. 435, 442 (Humphreys, J.): "* * * I think it is a fallacy to say or to assume that the presiding judge is a person who cannot be affected by outside information. He is a human being, and * * * it is embarrassing to a judge that he should be informed of matters which he would much rather not hear and which make it much more difficult for him to do his duty * * *" (Oliver, J.): "* * * the judge who, after hearing the statements, has to pronounce sentence, may, quite unconsciously, have his judgment influenced by matters which he has no right to consider. * * *"

[23] "In this connection, I do not think it is out of place to indicate the sort of grounds which would not afford to the minister adequate justification for objecting to production. It is not a sufficient ground that the documents are 'State documents' or 'official' or are marked 'confidential.' It would not be a good ground that, if they were produced, the consequences might involve the department or the government in parliamentary discussion or in public criticism, or might necessitate the attendance as witnesses or otherwise of officials

the Secretary made his determination in this case. See R. 22.

The Lords' final conclusion was that:

> When these conditions are satisfied and the minister feels it is his duty to deny access to material which would otherwise be available, there is no question but that the public interest must be preferred to any private consideration. * * * After all, the public interest is also the interest of every subject of the realm, and while, in these exceptional cases, the private citizen may seem to be denied what is to his immediate advantage, he, like the rest of us, would suffer if the needs of protecting the interests of the country as a whole were not ranked as a prior obligation.

The constitutional and public policy considerations which underlie the result in *Duncan* v. *Cammell, Laird & Co.*, have, we submit, even greater significance in the present case than in the English case, because the English constitution does not embody the doctrine of separation of powers and there

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who have pressing duties elsewhere. Neither would it be a good ground that production might tend to expose a want of efficiency in the administration or tend to lay the department open to claims for compensation. In a word, it is not enough that the minister of the department does not want to have the documents produced. The minister, in deciding whether it is his duty to object, should bear these considerations in mind, for he ought not to take the responsibility of withholding production except in cases where the public interest would otherwise be damnified, for example, where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service." [1942] A.C. at 642.

is no extensive history of executive independence like that we have discussed in the preceding subsection. None of these difficulties would confront an English court seeking to require disclosure. Hence —contrary to the view of the court below (see R. 56)—we think that the present case is *a fortiori*.[24]

In this case, there are also two more-specific privileges, universally admitted to be recognized by the common law, which support the Secretary's power to refuse to produce the documents even for the judge alone. The first is the so-called "state secrets" privilege; the other is the privilege against disclosing the identity of informers.

Even Wigmore, the doughtiest opponent of executive privilege, affirms that there is a common law privilege for matters concerning military or international affairs. 8 Wigmore, *Evidence* (3rd ed, 1940) §§ 2378-2378a, pp. 785, 789.[25] See *Totten* v. *United States*, 92 U.S. 105, 107, and cases cited in fn. 15, *supra*, p. 36. The Secretary's claim of privilege in the District Court falls squarely under that category, for he based his claim, in part, on the fact that the aircraft was engaged "in a highly secret military mission" and, again, on the "reason

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[24] The *Duncan* decision occasioned considerable comment, both pro and con (compare 193 L.T. 224; 21 Can. Bar Rev. 51; 58 L.Q. Rev. 31, with 58 L.Q. Rev. 436; 59 L.Q. Rev. 102; 20 Can. Bar Rev. 805); but when the Crown Proceedings Act, 1947, 10 and 11 Geo. 6, C. 44, § 28, authorized discovery against the Crown for the first time, it exempted any document which would, in the opinion of a Minister, be injurious to the public interest to disclose, and specifically provided for the right of the Minister to deny the very existence of such a document.

[25] Wigmore seems, however, to place in the courts the determination of whether military matters are actually involved. See Sec. 2379.

that the aircraft in question together with the personnel on board, were engaged in a highly secret mission of the Air Force. The airplane likewise carried confidential equipment on board and any disclosure of its mission or information concerning its operation or performance would be prejudicial to this Department and would not be in the public interest" (R. 22). This comment was made with respect both to the statements of witnesses and to the investigating board's report (R. 22).

The so-called informer's privilege is equally well established. The Government need not disclose the identity of criminal informers. *E.g.*, 8 Wigmore, *Evidence* (3d Ed. 1940) § 2374; *United States* v. *Moses*, Fed. Cas. No. 15825; *Mitrovich* v. *United States*, 15 F. 2d 163 (C.A. 9); *Segurola* v. *United States*, 16 F. 2d 563 (C.A. 1); *United States* v. *Li Fat Tong*, 152 F. 2d 650 (C.A. 2); *Trial of Thomas Hardy*, 24 How. State Tr. 199. This Court has recognized this privilege and applied it not only as to the identity of the informer but as to the contents of his statement. *Vogel* v. *Gruaz*, 110 U.S. 311; see *In re Quarles & Butler*, 158 U.S. 532, 535-536; accord, *Worthington* v. *Scribner*, 109 Mass. 487; *Gray* v. *Pentland*, 2 S. & R. 23 (Pa.). Contra: 8 Wigmore, *loc. cit. supra*. It is little or no extension of this common law rule to apply it so as to maintain secrecy for witnesses who might otherwise be reluctant to make statements to an investigating board inculpating themselves or their colleagues. See also *infra*, pp. 44-47, 49-50.

2. *Public policy considerations:*—This position is strengthened, we believe, by more detailed con-

sideration of some of the factors that underlie these common law privileges and which would militate against disclosure if the question were before the courts as an initial matter for their own determination. One of these factors, to which the Secretary pointed in the present case, is, of course, the desire to encourage the freest possible discussion before the Air Force Investigation Boards by the survivors of accidents. As the Secretary points out (R. 22), the purpose of the investigations is the development of flying safety measures. The informer's privilege discussed above (*supra*, p. 43) indicates the value placed by the law on maintaining secrecy for witnesses who might otherwise be reluctant to make statements inculpating themselves or others. The particular importance to the Air Force of completely protecting those who make important disclosures is emphasized by Amended A.F. Regulation No. 62-14A, which provides that the witnesses should be told that the investigation is not for disciplinary purposes.[26] The promotion of free disclosure, forming as it does the basis for the frequently applied common law rule, should, as we noted above (p. 43), also serve as a basis for extending the privilege from disclosure to

[26] "Purpose and Nature of Investigation: a. Witnesses appearing before an aircraft accident investigating board or officer conducting an investigation required by this Regulation will be advised:

(1) That the purpose of the investigation is to determine all factors in connection with the accident and to prevent a recurrence of the accident in the interest of flying safety.

(2) That it is not for the purpose of obtaining evidence for disciplinary action, for determining liability or line-of-duty status, or for reclassification.

(3) That it is not conducted under the 70th Article of War."

the circumstances of this case, even if it were considered as falling within the judicial orbit.

In regard to the report of the Accident Investigation Board, the policy factors are more complex. To the extent that the report may discuss the witnesses and their statements to the Board, the considerations just discussed are of course relevant. Also, to the extent that the report reveals military secrets concerning the structure or performance of the plane that crashed or deals with these factors in relation to projected or suggested secret improvements it falls within the judicially recognized "state secrets" privilege. See *supra*, pp. 42-43.

Beyond this, the factors militating against revelation of these reports are at least as strong as, and in our view considerably stronger than, those which have always caused Congress to recognize a privilege against disclosure in instances where the problem of disclosure of accident board reports has been specifically raised. As early as a 1910 amendment to the Interstate Commerce Act, Congress recognized the importance to effective federal accident investigation in the railroad field of shielding accident investigation reports against *use* (not merely admission into evidence) in litigation. 36 Stat. 351, 45 U.S.C. 41.[27] The House Committee which recommended this legislation stated:

> Your committee believes that if this bill passes and the authority provided in section 3 is given to the commission, thorough and care-

[27] "Neither said report nor any report of said investigation nor any part thereof shall be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation."

> ful investigations will be made, and as by section 4 of the bill neither the report made by the company nor the report of the investigation made by the commission are to be admitted as evidence or for any purpose in any suit or action for damages, it will be possible to secure full and complete testimony of all the facts connected with any given accident. [H. Rept. No. 36, 61st Cong., 2d Sess., p. 3.]

A comparable protection recognized for Civil Aeronautics Board investigation reports furnishes a more recent instance of the same policy.[28] See *Universal Airline, Inc.* v. *Eastern Air Lines*, 188 F. 2d 993 (C.A. D.C.).[29]

That Congress has not adopted a comparable provision for the Air Force, probably because the matter was not called to its attention, should not prevent the courts from themselves recognizing a similar bar to use of board reports on Air Force accidents, or at least from permitting the Secretary of the Air Force to establish a comparable rule

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[28] Section 701 of the Civil Aeronautics Act provides in part as follows: "The records and reports of the former Air Safety Board shall be preserved in the custody of the secretary of the Civil Aeronautics Board in the same manner and subject to the same provisions respecting publications as the records and reports of the Authority, except that any publication thereof shall be styled 'Air Safety Board of the Civil Aeronautics Authority', and that no part of any report or reports of the former Air Safety Board of the Civil Aeronautics Board relating to any accident, or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports." 52 Stat. 1012, as amended, 49 U.S.C. 581.

[29] But *cf. Pekelis* v. *Transcontinental & Western Air, Inc.*, 187 F. 2d 122 (C.A. 2), certiorari denied, 341 U.S. 951 (investigation reports of commercial airline admissible).

for Air Force casualties. Certainly, there is greater reason for non-disclosure of government reports of military crashes than in the case of commercial airline accidents.

C. *Even if a Department Head's Refusal to Produce Might be Reviewable in other Circumstances, there is no Occasion Here to Review or Disturb the Secretary's Determination.*

Our central position is that the power of determination is the Secretary's alone. This position is based, as we have shown, on the constitutional and statutory history of the executive's privilege. It is also based on the common law and on reasons of policy arising from the fact that the department head alone is truly qualified and in a position to make the determination. *Supra,* pp. 19-47. But we also take the view that even if there resides in the judiciary some residual power to review and reject a department head's refusal to produce, there is no occasion here to review or disturb the Secretary's determination.

As the House of Lords pointed out in the *Conmell, Laird* case, only the department head knows the exigencies of the public service; only widely separated portions of Air Force policy can come into overt consideration in a given litigation; and the fitting together of the scattered pieces can be accomplished only in the day to day decisions of the agency.[30] Similar reasons have underlain the

[30] See *Chicago, B. & Q. Ry. Co.* v. *Babcock*, 204 U.S. 585; *Perkins* v. *Endicott Johnson Corp.*, 128 F. 2d 208 (C.A. 2),

frequent decisions of Congress to delegate the delineation of legislative policy to administrative agencies, as it has done in R.S. 161 with regard to departmental documents. Factors motivating a congressional hands-off policy in so many areas should be recognized by the courts in this field, even if it were to be assumed, as it was by the district judge, that some power to overturn the invocation of governmental privilege lodged in the courts.

Carrying out the analogy, where Congress has delegated responsibility to an administrative agency, the day by day decisions of the agency in carrying out that responsibility have been traditionally not judicially reviewable on a claim of mere error.[31] Cf. *Adams* v. *Nagle*, 303 U.S. 532,

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affirmed, 317 U.S. 501. In the *Chicago B. & Q. Ry. Co.* case, Mr. Justice Holmes said (204 U.S. 585, 598):

> * * * But the action does not appear to have been arbitrary except in the sense in which many honest and sensible judgments are so. They express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions; impressions which may lie beneath consciousness without losing their worth. The Board was created for the purpose of using its judgment and its knowledge. [Citations omitted.] Within its jurisdiction, except, as we have said, in the case of fraud or a clearly shown adoption of wrong principles, it is the ultimate guardian of certain rights. The State has confided those rights to its protection and has trusted to its honor and capacity as it confides the protection of other social relations to the courts of law. * * *

[31] "Courts are not the only agency of government that must be assumed to have capacity to govern. * * * [I]nterpretation of our great charter of government which proceeds on any assumption that the responsibility for the preservation of our institutions is the exclusive concern of any one of our three branches of government * * * is far more likely, in the long run, 'to obliterate the constituent members'

540-541, 542; *Decatur* v. *Paulding*, 14 Pet. 497, 516. The heavy responsibilities that befall any department head in carrying out his official duties can hardly be met unless they are accompanied by a substantial amount of freedom in determining departmental policies."[32]

The responsibilities attaching to the office of the Secretary of the Air Force are especially grave in these times of uncertain world conditions. It is universally recognized that airpower plays an important role in the defense of the nation. And it is equally clear that an essential factor in the maintenance of aerial supremacy is the constant effort to improve aircraft from all technological standpoints including that of safety of operation.

The Secretary of the Air Force has determined that it is necessary to conduct investigations "to determine all factors in connection with the accident [involving aircraft] and to prevent a recurrence of the accident in the interest of flying safety." A.F. Regulation 62-14A. He has further determined that, in order to obtain the full disclosure from witnesses before the Aircraft Accident Board which is necessary to accomplish this objective, certain controls must

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of 'an indestructible union of indestructible states' * * *" Mr. Justice Stone dissenting in *United States* v. *Butler*, 297 U.S. 1, 87-8; cf. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 146; *Decatur* v. *Paulding*, *supra*, at p. 515.

[32] This is especially true in the military area where the Secretaries are the alter ego of the President. "An army is not a deliberative body. It is the executive arm." *In re Grimley*, 137 U.S. 147, 153.

be imposed on the use made of the Board reports. Accordingly, A.F. Regulation 62-7 provides that these reports will not be furnished to persons outside the authorized chain of command without the specific authority of the Secretary of the Air Force and that these reports will be classified no lower than "Restricted." A.F. Regulation 62-14A directs the investigating board or officer to advise witnesses of the single purpose of the investigation. It further decrees that the report of investigation and attachments "will not be used in any manner in connection with any investigation or proceeding leading toward disciplinary action, determination of pecuniary liability or line-of-duty status, or reclassification."

It seems difficult to question the correctness of the Secretary's conclusion, in his claim of privilege, that "The disclosure of statements made by witnesses and air-crewmen before Accident Investigation Boards would have a deterrent effect upon the much desired objective of encouraging uninhibited admissions in future inquiry proceedings instituted primarily in the interest of flying safety" (R. 22). And it must be remembered that the Secretary's decision on this aspect of his claim of privilege was made, not in terms of this particular litigation, but in the light of factors entirely independent of this particular aircraft and the contents of this particular report of investigation. The pertinent Air Force regulations, discussed above, were grounded on considerations applicable to all investigations of military aircraft accidents and the force of these regulations is not al-

tered either by a specific witness's testimony or by the conclusions arrived at by the Accident Investigation Board on a given occasion. To question this determination necessarily involves weighing the pros and cons of disclosure of official military documents and affairs without an intimate knowledge of the needs of the military establishment. In the absence of compelling evidence to the contrary, it can be presumed that the Secretary has given full consideration to the problems involved in civil litigation, has weighed the possible hardships to plaintiffs, and has made a responsible decision in the light of the adverse effects of nondisclosure. Having performed his duties in accordance with the mandate of Congress, his judgment should be taken as conclusive. The courts "should not overrule an administrative decision merely because they disagree with its wisdom." *Radio Corporation of America* v. *United States*, 341 U.S. 412, 420.[33]

Recognition that only the executive is in a posi-

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[33] "The secretary of war is the regular constitutional organ of the president, for the administration of the military establishment of the nation; and rules and regulations publicly promulgated through him must be received as the acts of the executive, and as such, be binding upon all within the sphere of his legal and constitutional authority. *Such regulations cannot be questioned or denied, because they may be thought unwise or mistaken.*" *United States* v. *Eliason*, 16 Pet. 291, 302 (italics supplied); cf. *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U.S. 80, 94; *United States* v. *George S. Bush & Co.*, 310 U.S. 371, 380; *Gray* v. *Powell*, 314 U.S. 402, 412; *Securities and Exchange Commission* v. *Central-Illinois Securities Corporation*, 338 U.S. 96, 126; *American Power Company* v. *Securities and Exchange Commission*, 329 U.S. 90, 118.

tion to estimate the full effects of such disclosure is a weighty reason for upholding the Secretary's claim in this case. The problem here is clearly an administrative one; and, unless the courts are to interfere in the administration of Government, they must trust in the judgment of the appointed administrator where, as in this case, it is plain on the face of the record that he acts within the sphere of administration and not for extra-administrative motives which should not be his concern.

II

The Court Below Erred in Permitting the Executive Privilege Against Disclosure to Be Circumvented by Finding a Waiver of the Privilege in the Tort Claims Act and Federal Rules of Civil Procedure

What we have said so far indicates that the Secretary has the power to refuse or ignore any demand or coercive order for production of these documents addressed by the court to him personally. With this as a premise, we come to examine the error in the position of the court below in seeking to exclude this power from consideration in this case. That court took the view that there was no conflict between the power of the Secretary to refuse a direct demand and the power of the court to impose its will by means of an order directed to the United States and carrying with it the sanction of denying the Government the opportunity to present evidence on the merits of the litigation.

At the outset, we must clear away the primary error in this conclusion which is revealed by the statement that the court's only concern in this case

is "with ascertaining the legal duty of the Secretary * * * to make the requested discovery," and not with the propriety of an action directed against the Secretary's person (R. 50). This view appears to be based on the concept that the Secretary's "legal duty" exists apart from the court's power to reach him by subpoena or other direct order. But the considerations of history and public policy discussed in the preceding section of this brief indicate that the court's lack of power to subpoena the executive is more than a mere bowing to the recognition that in any show of naked force the executive would probably win. Whether or not such a recognition lies at the bottom of some of the constitutional, statutory, and common law principles discussed, nevertheless, above and beyond this, these principles have become a part of the Constitution, of the law, and of the tacit assumptions on which the governing process has proceeded. The result is that the Secretary, in making his determination not to disclose, was carrying out his legal duty, not subverting it.[34] He was carrying out the duty entrusted to him by the law to make a deter-

[34] It may be presumed that public officials perform their duties conscientiously. "The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States* v. *Chemical Foundation*, 272 U.S. 1, 14-15; cf. *R. H. Stearns Co.* v. *United States*, 291 U.S. 54, 63-64; *Wilkes* v. *Dinsman*, 7 How. 89, 130. Our tripartite form of government of its very nature requires that presumption. In the words of Mr. Justice Holmes, quoted recently by Mr. Justice Frankfurter: "Universal distrust creates universal incompetence." *Kerotest Mfg. Co.* v. *C-O-Two Co.*, 342 U.S. 180, 185. If the judiciary were to act on the premise of executive misfeasance or incompetence, the consequence would be the weakening of the executive and, therefore, of our tripartite sytem.

mination whether the public interest would be better served by disclosing the documents or by withholding them. And, in so doing, he may be deemed to have considered the plaintiffs' interest in a fair trial as well as the Air Force's interest in protecting its secrets. "After all the public interest is also the interest of every subject of the realm, and while, in these exceptional cases, the private citizen may seem to be denied what is to his immediate advantage, he, like the rest of us, would suffer if the needs of protecting the interests of the country as a whole were not ranked as a prior obligation." *Duncan* v. *Cammell, Laird & Co.*, [1942] A.C. 624, 643.

Once it is recognized that the duty of appraising all relevant considerations resides in the Secretary, and not in the court, it becomes clear that the course adopted by the District Court and approved by the court below was improper. What the court may not do by direct order, it may not do by conditional order. It may not make the Secretary's determination whether to withhold disclosure conditional upon the entry of a large judgment against the Government in the event that he does so determine. To do so would in effect subject the United States to a penalty, which may not be done, at least in the absence of express legislative mandate. And, contrary to the view of the court below, we think it clear that Congress has not attempted to do so.

In this section, we shall elaborate the reasons for these views. We shall begin by showing that nothing in the Tort Claims Act, on which the court be-

low relied, imposes on the department head a "legal duty" of making disclosure on pain of subjecting the United States to judgment if he refuses. Indeed, as we shall show, the Federal Rules forbid such a result and make available an alternative course which the District Court should have pursued.

A. *Nothing in the Tort Claims Act or Federal Rules Imposes on the Department Head Any Duty of Disclosure.*

Section 410 of the Federal Tort Claims Act (28 U.S.C. 1346, 2674) provides that "the United States shall be liable * * * in the same manner and to the same extent as a private individual under like circumstances." Also, the Federal Rules of Civil Procedure are made applicable to all suits under the Tort Claims Act. *United States* v. *Yellow Cab Company*, 340 U.S. 543, 553. The court below held that these provisions permitted the discovery order, under Rule 34, and also the sanction imposed by the District Court, holding that the order taking the issue of negligence as found against the Government was provided for by Rule 37(b)(2), *infra*, pp. 76-77. Rule 37(b)(2) states in part:

> If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document * * * the court may make such orders in regard to

the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses * * *.

It may be conceded that both the Tort Claims Act and the Federal Rules were intended to make the discovery procedure of Rules 26-27 applicable generally to the Government,[35] and that the

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[35] Section 411 of the Tort Claims Act (60 Stat. 844, 28 U.S.C. (1946 ed.) 932), as originally enacted, provided expressly that the Rules of Civil Procedure should apply to suits under the Act. In the 1948 revision of Title 28 this section was omitted as unnecessary "because the Rules * * * shall apply to all civil actions." S. Rept. No. 1559, 80th Cong., 2d Sess., p. 12. Section 411, in substantially the form of its final enactment, first appeared in the legislative history of the Tort Claims Act as Section 302 of H.R. 6463, 77th Cong., 2d Sess. That section was offered and accepted as a substitute for Sections 202 and 305 of H.R. 5373, 77th Cong., 2d Sess., which expressly provided for matters such as depositions and discovery against the Government. The purpose of the substitution was to eliminate the need for specific mention of these matters. See *Hearings Before House Committee on the Judiciary on H.R. 5373 and H.R. 6463*, 77th Cong., 2d Sess., pp. 61-62.

In the original enactment of the Federal Rules there was also indication of an intention to make discovery provisions of Rules 26-37 generally applicable to the Government. See *e.g., Proceedings of the Institutes on the Federal Rules of Civil Procedure, Washington, D. C.* 1938, pp. 101, 105, 266;

United States was generally to be liable as if it were a private individual; but to concede this general intention does not dispose of this case. For the issue, at this point, is the specific one of whether Congress waived or withdrew, as the Court of Appeals put it (R. 50), the executive privilege in Tort Claims cases. On that specific issue, all the relevant materials point definitively to a negative answer.

1. In the first place, the Tort Claims Act makes the Federal Rules applicable, and Rules 26 and and 34 are expressly restricted to matters "not privileged." There is ample place for use of the general discovery machinery of Rules 26-37 against the Government without extending it to override this express restriction.[36] And there is nothing in the legislative history of the Tort Claims Act which indicates that Congress meant in effect to punish the United States whenever the executive branch of the Government should assert a privilege which it had been asserting since almost the beginning of the Republic and which other branches had repeatedly refused to assail directly. Moreover, and most important, there is specific evidence in the legislative history of the Federal Rules,

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ibid., Cleveland Proceedings, p. 334. But, as we show *infra*, p. 58, this same history indicates an intention to except Government documents which are privileged.

[36] Still available against the Government are for example, interrogatories under Rule 33 (see, *e.g.*, R. 8-14), requests for admission of the truth of facts or the genuineness of documents under Rule 36, depositions under Rule 26 (obtained by subpoena under Rule 45) in matters not privileged, and discovery of the large mass of documents as to which no privilege is claimed.

which form an integral part of the Tort Claims statutory scheme, that the very privilege here asserted was to be recognized. In the *Proceedings of the Institutes on the Federal Rules,* the question was asked whether the rules as to discovery were intended to apply when the United States is a party. Professor Sunderland, of the Advisory Committee, which drafted the Rules, replied (*Proceedings of the Institutes on the Federal Rules of Civil Procedure, Washington, D. C.* 1938, pp. 266-267; see also *id.* at 105.):

> I suppose they do, and the only limitation with respect to the government would be that *if any subject ought to be considered privileged as a matter of governmental policy, it need not be disclosed under the discovery examination,* but all other relevant matters would have to be disclosed by the government upon a discovery examination [italics supplied].[37]

2. The statutory provision that the United States shall be liable "in the same manner and to the

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[37] Referring to the absence in the Tort Claims Act of a provision comparable to 28 U.S.C. 2507, which expressly authorizes the head of a department to refuse a call for information from the Court of Claims "when, in his opinion, compliance will be injurious to the public interest" (R. 53), the court below inferred that Congress intended to deny the privilege in Tort Act suits. But it is much more probable that Congress felt it unnecessary to include such a provision for tort claims because the Federal Rules were being made applicable and, with their specific provision for "privileged" matter, would fulfill the function of 28 U.S.C. 2507. It is significant that, probably for the same reason, there is no clause like Sec. 2507 for District Court Tucker Act suits, although this branch of the District Courts' jurisdiction is entirely "concurrent" with that of the Court of Claims. *United States* v. *Sherwood,* 312 U.S. 584, 589-591.

same extent as a private individual under like circumstances" does not constitute a "waiver". That provision is mainly concerned with marking the substantive liability of the United States (see *Feres* v. *United States,* 340 U.S. 135, 141-142), and even in that sphere it is not without exceptions, specific and implied. See *United States* v. *Hull,* 195 F. 2d 64, 67 (C.A. 1); 28 U.S.C. 2680. If in view of the applicability of the Federal Rules, the clause has any special bearing on procedural matters, it should be read in the light of the Court's pertinent remark in *Feres:* "We cannot impute to Congress such a radical departure from established laws in the absence of express congressional command." *Feres* v. *United States, supra,* at 146; see *United States* v. *Sherwood,* 312 U.S. 584, 589-590.

R.S. 161, as the executive has read it, embodies a policy of great strength and with a long and active history. The privilege to withhold documents from Congress and the courts has been in the forefront of our national life for over a century and a half. *Supra,* pp. 19-35. Surely there would have been some express legislative direction, some reference to the subject, if Congress had intended in the Tort Claims Act to waive, withdraw, or by-pass the privilege, assuming that it could do so. A general clause about suability as a private party, which clearly had another primary purpose, would hardly be adequate, particularly when the Federal Rules themselves referred generally to "privileged" documents. Rather, this is one of those many areas in which "the entire scope of Congres-

sional purpose calls for careful accommodation of one statutory scheme to another * * *." *Southern Steamship Co.* v. *Labor Board,* 316 U.S. 31, 47.

There is a further reason why the "private party" language in 28 U.S.C. 1346 and 2674 cannot control. As in *Feres,* we have here a field in which the United States cannot be likened to a private party. The documents are privileged because the Government claims that disclosure would be against the public interest; there can be no parallel claim in the case of a private party and no private interest of scope comparable to the public interest. Moreover, the public interest—by which the privilege requires the Secretary to be ruled in making his decision to produce or withhold—includes both the policy reasons for preserving secrecy and the opposing policy reasons for securing the fullest possible information for litigants. Thus the exercise of the privilege represents a considered judgment by the Secretary that the public interest will in the long run be best served by preserving secrecy, even though in the short run secrecy may in some cases and to some extent obstruct the public interest in full justice for the litigant. It must be presumed, we think, that in making this difficult decision, the Secretary gives due weight to both factors.[38] For this reason the Government can

[38] In this case, the Air Force went as far as it deemed it could without compromising the security of the documents themselves. It offered to furnish the names and addresses of the survivors, undertook to make them available for

never in this area be analogized to a private party. If a private litigant elects not to disclose, he is in effect determining that his own interests will be best served by preserving secrecy, even if his choice entails the penalty provided by the Rules. He therefore elects to pay the penalty. When the Secretary elects not to disclose, on the other hand, he is not considering his own interest but is weighing two opposing aspects of the public interest. And as we have shown, *supra*, pp. 37-52, he is the person best qualified to do so.

3. Further support for the view that it was not intended to treat the Government like a private party in respect to compelling discovery is to be found in the fact that Rule 55(e) of the Rules of Civil Procedure forbids default judgments against the United States "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court".[39] This provision prevents the entry of default judgments against the United States by the usual procedure, in private actions, of taking the allegations of the pleadings as true (cf. *United States* v. *Geisler*, 174 F. 2d 992, 999 (C.A. 7), certiorari denied, 338 U.S. 861), and was

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pre-trial depositions at the Government's expense, and guaranteed to authorize them to testify freely on all matters except those which are classified. See *infra*, p. 71.

[39] This provision is derived from Section 6 of the Tucker Act. Act of March 3, 1887, c. 359, 24 Stat. 505, 506. It was incorporated in the Rules and in the 1948 revision was accordingly dropped from the Judicial Code. See notes of Advisory Committee on Rules of Civil Procedure, S. Doc. No. 101, 76th Cong., 1st Sess., p. 271; H. Rept. No. 308, 80th Cong., 1st Sess., p. A 239.

enacted with a view to deterring collusive judgments.

This express restriction on default judgments where the United States is concerned would be inconsistent with the provisions of Rule 37(b)(2) *supra*, pp. 55-56, on which the District Court's bar order in this case was based, if Rule 37(b)(2) were held applicable to this case. Default judgments were only one of four alternative remedies provided by Rule 37(b)(2) for disobedience to a discovery order; and the court below held (R. 56-58) that since the District Court's order was supportable under the other provisions of Rule 37(b)(2), there was no conflict with the restriction on default judgments. Our contention here, however, need not be that Rule 55(e) expressly forbids the order entered by the District Court. Rather, we think that the presence of Rule 55(e) is a further significant indication that the United States was not meant to be treated exactly like a private party. In this case, where there was only one issue—that of negligence—the District Court's order left the Government in as bad a position as would the actual entry of a default judgment. Far from being authorized by the Rules, this action was contrary to their intention.

B. *The Decision Below Violates the Executive's Privilege by Penalizing the United States*

It is clear therefore that the Tort Claims Act and the Federal Rules do not seek to waive or withdraw or by-pass the executive's privilege

against discovery. On the contrary, they recognize and affirm it. The remaining question is whether the roundabout procedure adopted below violates this privilege which Congress has not sought to weaken or diminish, and which the Court of Appeals itself assumed would exist if a direct demand were made upon the Secretary.

The answer to this question is found in the further inquiry:—Does the procedure adopted below unduly interfere with the Secretary's exercise of his recognized privilege? And the answer here must be yes. The decision whether or not to disclose is the Secretary's alone; counsel for the Government in the tort action cannot compel him to do so and, indeed, are not permitted by him to see the documents. But it will not do to say that if he decides not to disclose, his enjoyment of the privilege is not prevented by the order barring the Government's defense in the tort action. If the decision of the lower courts is upheld, the Secretary is put in an intolerable position. Of course, such an order does not put an end to the secrecy which he finds the public interest requires, but the threat of the consequence of nondisclosure cannot do other than influence his decision. No government official who is conscious of his responsibilities can view dispassionately the turning over of large sums of public monies to persons who have made no showing that they are entitled to them. Nor can he readily yield when, in his view, so much in terms of the security of the nation and the welfare of thousands of airmen is at stake. The

Secretary is faced with an acute dilemma to which there is no available answer short of the abdication of responsibility and the sacrifice of the public interest.[40] It seems inadmissible to us that, on the one hand, the Secretary would be clothed with the responsibility of making the policy determinations necessary for the efficient administration of the Air Force, and then, on the other hand, shackled so he could not follow through on these determinations.

The position of the public treasury is no less anomalous. If the Secretary in spite of the sanction refuses disclosure, he has made a decision which is correct as a military matter. The custodians of the treasury, not being vested as is the Secretary with discretion on military affairs, have no more power of review than the courts or the Department of Justice. Yet the result is that without a real determination of plaintiffs' right to public funds, without an adjudication of whether or not the government acting through its em-

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[40] Public policy requires courts to be wary in exerting pressures on responsible officers, especially where the courts cannot issue direct commands. *Yakus* v. *United States*, 321 U.S. 414, 440. This has been recognized in the long line of decisions which have rendered public officers personally non-accountable to court and jury for their official acts. *Spalding* v. *Vilas*, 161 U.S. 483; *Lang* v. *Wood*, 92 F. 2d 211 (C.A. D.C.), certiorari denied, 302 U.S. 686; *Cooper* v. *O'Connor*, 99 F. 2d 135 (C.A. D.C.); *Grégoire* v. *Biddle*, 177 F. 2d 579 (C.A. 2), certiorari denied, 339 U.S. 949. As was said in the *Cooper* case, *supra*: "The reason * * * is simply one of public policy. 'Otherwise the perfect freedom which ought to exist in discharge of public duty might be seriously restrained, and often to the detriment of the public service.' De Arnaud v. Ainsworth, 24 App. D.C. 167." Cf. *Wilkes* v. *Dinsman*, 7 How. 89.

ployees was culpable in any manner, a money judgment, perhaps substantial, follows. The inevitable influence on the Secretary, arising from his concern for this anomalous position of the treasury, constitutes, in our view, an improper interference with his performance of the duties of his office.

As we have pointed out, *supra*, pp. 51, 54, the Secretary must weigh not only the public's interest in maintaining security but also its great interest in assuring litigants full information. These opposing interests being weighed in the balance, by the person best qualified to weigh them, there should not also be thrown into the scales the consideration that a decision one way will have the consequence of subjecting the public to a large judgment. To do so is to weight doubly the immediate interest of the private litigant in a way which goes far to compel disclosure regardless of the true measure of the public interest.

The real effect and result of the procedure followed below is thus to compel the Government to pay a penalty for the Secretary's decision. It is axiomatic that the United States is not subject to penalties unless the statute expressly provides. *Missouri Pac. R.R. Co.* v. *Ault*, 256 U.S. 554; *Dasher* v. *United States*, 59 F. Supp. 742, 743 (S.D. N.Y.); *Butler* v. *United States War Shipping Admin.*, 68 F. Supp. 441 (E.D. Pa.); *United States* v. *Nelson*, 91 F. Supp. 557 (N.D. Ill.). Congress cannot have intended to penalize the United States for its officer's performance of a duty recognized

by Congress itself. And if Congress did not so intend, the court violated the axiom in doing so.

It is this penal aspect, together with its unfair burden on the executive, that distinguishes the present case from cases in which discovery is sought against the United States as plaintiff. Cf. *United States* v. *Cotton Valley Operators Committee*, 9 F.R.D. 719 (W.D. La.), affirmed *per curiam* by an equally divided court, 339 U.S. 940.[41] Whatever may be the propriety of forcing the Government to an election between disclosing the documents pertaining to a transaction and fore-

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[41] The following lower court cases have denied discovery, even though the Government was plaintiff: *United States* v. *Lorain Journal Co.*, 10 F.R.D. 487 (N.D. Ohio); *United States* v. *Schine Chain Theaters*, 4 F.R.D. 108 (W.D. N.Y.); cf. *Walling* v. *Comet Carriers*, 3 F.R.D. 442 (S.D. N.Y.); but cf. *Walling* v. *Richmond Screw Anchor Co.*, 4 F.R.D. 265 (E.D. N.Y.). Contra: *Fleming* v. *Bernardi*, 1 F.R.D. 624 (N.D. Ohio). The following have granted discovery even though the Government was defendant: *Cresmer* v. *United States*, 9 F.R.D. 203 (E.D. N.Y.); *Wunderly* v. *United States*, 8 F.R.D. 356 (E.D. Pa.).

Under the analogous discovery provisions of the Admiralty Rules, discovery has been denied against the United States as libelee in the following: *Anglo-Saxon Petroleum Co.* v. *United States*, 78 F. Supp. 62 (D. Mass.); *The Wright Papoose*, 2 F. Supp. 43 (E.D. N.Y.); *Maryland to use of Kent* v. *United States*, [1947] A.M.C. 1336 (D. Md.); cf. *Alltmont* v. *United States*, 177 F. 2d 971 (C.A. 3). *Pacific-Atlantic S.S. Co.* v. *United States*, 175 F. 2d 632 (C.A. 4), certiorari denied, 338 U.S. 868, upheld the privilege for the report of a Naval Board of Inquiry. In *Bank Line Ltd.* v. *United States*, 68 F. Supp. 587 (S.D. N.Y.) discovery was granted against the Government which then sought a writ of prohibition from the Court of Appeals. The latter held this relief to be beyond its jurisdiction but remanded the case with a recommendation to the district court that it consider some of the arguments and authorities discussed in Point I of this brief. 163 F. 2d 133 (C.A. 2). On remand the district court refused to withdraw its order. 76 F. Supp. 801 (S.D. N.Y.).

going its right to maintain an action based on that transaction, it seems to us clearly improper to compel it to elect between disclosing and foregoing a defense to an action against it.[42] In the formulation of an administrative policy which is to be enforced by instituting litigation, account may be taken, as an integral part of the policy, of the fact that disclosure is a condition precedent to the right to maintain the suit; and the agency may choose its ground accordingly. But where the Government is required to defend tort actions, there is no choosing of ground by either party; the occasion for bringing suit is purely fortuitous, and no administrative policy can properly take account of it.

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[42] There is even more ground for distinguishing the line of criminal cases which hold that instituting the prosecution constitutes a waiver of the privilege. *United States* v. *Andolschek*, 142 F. 2d 503 (C.A. 2); *United States* v. *Krulewitch*, 145 F. 2d 76 (C.A. 2); *United States* v. *Beekman*, 155 F. 2d 580 (C.A. 2); *United States* v. *Grayson*, 166 F. 2d 863 (C.A. 2). Criminal defendants are by the common law, by statute, and by the Constitution afforded greater safeguards than are parties to civil actions.

Judge Hand's opinions in the line of cases cited appear to look in the direction of recognizing the Government's privilege not to disclose in civil cases, even while holding that institution of a criminal prosecution waives it. Thus, he says, "*While we must accept it as lawful for a department of the government to supress documents, even when they will help determine controversies between third persons*, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate." *United States* v. *Andolschek*, 142 F. 2d 503, 506 (C.A. 2) (italics supplied). And again: "We need not say that there can never be situations in which a privilege created by departmental regulation will not prevail, just as it would prevail if Congress had created an unconditional privilege * * *." *United States* v. *Grayson*, 166 F. 2d 863, 870 (C.A. 2).

When there is added to this fortuitous factor the element that if the Government chooses not to waive its privilege, it is subjected to a heavy penalty, it is clear that to compel the election is to violate the privilege.[43]

Accordingly, in the absence of any specific indication of a contrary intention, we do not believe that Congress intended—even if it has power—to

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[43] There is an analogy between the indirect compulsion to produce exerted below and the long line of cases on unconstitutional conditions—cases holding that the states may not, as a condition to the exercise of a privilege which the state may constitutionally withdraw outright, require the relinquishment of a constitutional right which it could not directly withdraw. See, *e.g.*, *Terral* v. *Burke Construction Co.*, 257 U.S. 529; *Frost Trucking Co.* v. *Railroad Comm.*, 271 U.S. 583, and cases cited. Thus, Congress could not, as a condition of its not exercising its power to withdraw defenses in suits against the Government, require relinquishment of the executive's constitutional privilege against disclosure. "In reality, the carrier is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden." *Frost Trucking Co.* v. *Railroad Comm.*, 271 U.S. 583, 593.

On the other hand, *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322, which held that a state had power to compel a corporation to make discovery of documents held outside the state, as a condition of the right to do business (cf. *Consolidated Rendering Co.* v. *Vermont*, 207 U.S. 541; *Wittenberg Coal & Coke Co.* v. *Compagnie Havraise Peninsulaire, etc.*, 22 F. 2d 904 (C.A. 2)), is not analogous, because a private party—unlike the executive branch of the Government—has no constitutional privilege not to produce; hence the condition is not unconstitutional. "It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights." *Frost Trucking Co.* v. *Railroad Comm.*, 271 U.S. at 593-594. Compare also *Hovey* v. *Elliott*, 167 U.S. 409.

override or waive the historic privilege of the executive, merely by incorporating the Federal Rules into the Tort Claims scheme. Congress can hardly have considered the matter specifically in sponsoring the Rules, the formulation of which was left to this Court. Cf. *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 14. And whenever Congress has been confronted specifically with the question of the need to preserve secrecy in public accident investigations, it has decided, as in the Interstate Commerce Act and the Civil Aeronautics Act, *supra*, pp. 45-46, in favor of nondisclosure. The same result is required here by the Rules' exemption of privileged matter, including, as it clearly does, governmental privilege in whatever areas the constitution, history or public policy demand it.[44]

III

Good Cause for Discovery Has Not Been Shown

Thus far we have argued that the court below gave to the Tort Claims Act and to the Rules of Civil Procedure a construction at odds with the long standing constitutional and statutory privilege of the executive not to disclose. We wish now to show that, apart from any question of privi-

[44] To read the Tort Claims Act or the Federal Rules so as in effect to require the disclosure of privileged documents would either be unconstitutional, or at least of such doubtful constitutionality, that, if possible, it should not be done. *United States* v. *Shreveport Grain & Elevator Co.*, 287 U.S. 77, 82; *Interstate Commerce Commission* v. *Oregon-Washington R. & N. Co.*, 288 U.S. 14, 40; *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 348; *Labor Board* v. *Jones & Laughlin Corp.*, 301 U.S. 1, 30; *Anniston Mfg. Co.* v. *Davis*, 301 U.S. 337, 351-352; *Ex parte Endo*, 323 U.S. 283, 299.

lege, the order of the District Court, approved by the court below, was contrary to the Rules. The right to discovery under Rule 34 is in all cases conditional upon a showing of "good cause" for discovery. In view of the weighty questions involved in the course adopted by the court and in view of the relatively minor importance of discovery in the circumstances of this lawsuit, we think no adequate showing of cause has been made in this case. We recognize that the determination of what constitutes good cause in a given case is largely within the discretion of the District Court. But we think that in this case the court abused its discretion.

The District Court predicated its finding of good cause upon the respondents' bare contention that the documents sought contained information necessary in preparation for trial, that they were in possession of the United States, and that the respondents knew of no other way to obtain knowledge of their contents than by examining them (R. 14-16). The court, in its opinion granting respondents' motion for production (R. 17-21), found that good cause had been shown largely because of the burden, expense, and inconvenience placed on plaintiffs in taking the depositions of witnesses located in a distant state. The lower court also stated that the requested documents would be necessary because the length of the time that had elapsed since the air crash might tarnish the memory of the witnesses and the fact that they were subject to military authority would tend to make them biased (R. 18-19).

To meet the objections of the lower court, the Air Force formally offered to make the three witnesses available "at the expense of the United States for interrogation by the plaintiffs at a place and time to be designated by the plaintiffs" (R. 27).[45] This offer further averred that the witnesses would "be authorized to testify regarding all matters pertaining to the cause of the accident except as to facts and matters of a classified nature," and that these witnesses would be permitted and authorized "to refresh their memories by reference to any statements made by them before Aircraft Accident Investigating Boards or Investigating Officers, as well as other pertinent and material records that are in the possession of the United States Air Force" (R. 27). Respondents thus have an opportunity, as yet unexplored, to take the depositions of the witnesses whose statements are desired at little or no inconvenience or expense to themselves. Furthermore, they have the assurance of the Air Force that these witnesses will be fully cooperative and will have complete and detailed knowledge of the events as they happened through the use of their own statements and any other pertinent or material records. This offer by the Air Force leaves the finding of good cause by the lower court completely unsupported.

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[45] The offer was made although cases have held that the absence of witnesses from the state where the deponent resides is insufficient cause to warrant an order requiring production of such documents. See *e.g.*, *Lester* v. *Isbrandtsen Co.*, 10 F.R.D. 338 (S.D. Tex.); *Reeves* v. *Pennsylvania R. Co.*, 8 F.R.D. 616 (D. Del.); *Berger* v. *Central Vermont R. Co., Inc.*, 8 F.R.D. 419 (D. Mass.).

The Government's offer to produce the witnesses, even standing alone, might well be regarded as sufficient to obviate all cause for discovery, but added to this must be the consideration that the refusal to produce the documents themselves was made for important reasons of public policy, and that any order requiring discovery was of doubtful validity. *Hickman* v. *Taylor*, 329 U.S. 495, implies that where there are strong considerations of public policy militating against disclosure, the party seeking discovery must show exceptional circumstances in order to establish good cause. In that case the policy considerations revolved around the secrecy of the lawyer's "work product"; in this case, they center about the constitutional, doctrinal, and historical factors that we have discussed in the preceding sections of this brief. In other words, the very existence of substantial reasons for claiming privilege adds to the burden on the party seeking to show cause why production of the documents is necessary.

From the Government's point of view, an order by the court compelling discovery would have had an important effect on the policy and operations of a coordinate branch of our tripartite system. From the respondents' point of view, however, the granting of discovery would not go to the heart of their case. Discovery is merely one of many aids to trial. There is no showing that the material sought could be used in evidence. Cf. *Chapman* v. *United States*, 194 F. 2d 974 (C.A. 5), now pending on petition for a writ of certiorari, No. 105,

this Term. It is merely a means of discovering evidence, and it is apparent that until resort to interrogatories, depositions, and pretrial conferences has been exhausted without aiding respondents to build a case on the merits, to deny discovery is not to withhold substantial justice. And at least so long as substantial justice is not denied a proper regard by the court for the aims and operations of a coordinate branch of the Government should compel a court to hold its hand.[46]

We suggest that the only proper course for the District Court would have been to delay making any order requiring production until the witnesses could have been produced, their depositions taken, and a pretrial conference held. Only then could the court have determined whether an invasion of the claimed privilege was really necessary. The course adopted by it was erroneous.[47]

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[46] "For aught that appears, the essence of what [respondent] seeks either has been revealed to him already through the interrogatories or is readily available to him direct for the asking." *Hickman* v. *Taylor*, 329 U.S. 495, 509.

[47] In *Boske* v. *Comingore*, 177 U.S. 459, and *Touhy* v. *Ragen*, 340 U.S. 462, the Court held that, where production of departmental documents is declined by virtue of orders of heads of departments issued pursuant to R. S. 161, the validity of that action cannot be challenged except by direct process against the head of the department. The court below held, however, that in this case direct process need not be issued against the Secretary of the Air Force because the suit was against the United States and the Secretary was bound to obey an order issued against the United States as a party defendant. We believe, however, that the requirement of the *Boske* and *Touhy* cases was more than merely technical and cannot be avoided simply because the United States is the party-defendant. We submit that those cases require that, after the decision by the head of the department, the issue of the validity of his decision should be tested directly. This

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed and the cause remanded to the District Court for a new trial.

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SEPTEMBER, 1952.

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is especially true where, as shown above (pp. 52-69), there is no reason to believe that Congress has sought to by-pass the executive's right to claim privilege. Thus, proceedings should have been instituted under Rules 26 and 45 to bring the Secretary of the Air Force squarely before the court. If such a procedure were followed, final decision on the propriety of his action would permit both parties to the case to proceed to the merits, either with or without the disclosure requested.

However, the Secretary's action in appearing and filing a claim of privilege in the District Court (*supra*, pp. 5-6) may well have constituted an *ad hoc* agreement to test the privilege question in the Tort Claims suit itself. We no longer contend, therefore, that the judgment below should be reversed on the ground that the issue should have been decided in a proceeding directed against the Secretary personally.

APPENDIX

1. Section 161 of the Revised Statutes, 5 U.S.C. 22, provides:

> The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

2. 28 U.S.C. 2674 provides in pertinent part as follows:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

3. The pertinent provisions of the Federal Rules of Civil Procedure read as follows:

> Rule 34. *Discovery and Production of Documents and Things for Inspection, Copying, or Photographing.* Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs,

objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26(b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

Rule 37. *Refusal to Make Discovery: Consequences.*

* * * * *

(b) Failure to Comply with Order.

* * * * *

(2) *Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under

Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.

Rule 55. *Default.*

* * * * * *

(e) Judgment against the United States. No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

4. The pertinent provisions of the Air Force Regulations read as follows:

AF Regulation No. 62-7.

Department of the Air Force Headquarters,
United States Air Force, Washington
17 December 1947

FLYING SAFETY

Safeguarding Aircraft Accident Information

(This Regulation supersedes AF Letter 62-7, 19 September 1944).

1. *Definitions.* For the purpose of this Regulation the following definitions will apply.

a. *"Extract of a Report"*—is a summary, excerpt, quotation, or condensation of the report which contains the time or place of the incident, names of the persons involved, or aircraft serial number.

b. *"Officials in the Authorized Chain of Command"*—are commanders and individuals under their command at all echelons, in the National Military Establishment

whose official duties in connection with aircraft accident prevention require knowledge or possession of accident information.

2. *General.* Reference is made to AR's 95-120, 380-5, and 420-5; AF Regulations 46-17, 47-4, and 62-14; and AF Letter 45-6. In addition to the established procedure for handling and releasing classified information, there are additional safeguards necessary for aircraft accident information. Accident investigations are not conducted under the 70th Article of War. Aircraft accident information is procured from reports of personnel who have waived their rights under the 24th Article of War in the interest of accident prevention upon the assurance that the reports will not be used in any manner in connection with any investigation or proceeding toward disciplinary action, determination of pecuniary liability, or line-of-duty status or reclassification.

3. *Purpose.* Since certain facts have been accumulated as a result of aircraft accident investigation, it is convenient in many instances to abstract data from these reports for purposes other than the prevention of accidents. This violates the purpose for which the information was accumulated. The purpose of this Regulation is to limit the use of accident information to accident prevention and such additional uses as authorized in this Regulation.

4. *Handling of Aircraft Accident Information within the Authorized Chain of Command:*

a. Reports of boards of officers, special accident reports, or extracts therefrom will not be furnished or made available to persons outside the authorized chain of command without the specific approval of the Secretary of the Air Force.

b. All aircraft accident data (reports, statistics, studies, publications, etc.) will be classified no lower than *Restricted.* Higher classification is governed by AF Regulation 62-14.

* * * * *

5. *Release of Aircraft Accident Information:*

* * * * * *

b. Reports of boards of officers, special accident reports, or extracts therefrom will not be furnished or made available to persons outside the authorized chain of command without the specific approval of the Secretary of the Air Force.

* * * * *

g. * * * (1) Manufacturers' representatives who are stationed with Air Force organizations to assist in solving maintenance and operational problems of products manufactured by the organizations they represent are to be given full access to the

scene of any and all accidents involving such products and to all information concerning such accidents that may be obtained by the Air Force except the official written reports of investigations or extracts therefrom.

* * * * *

6. *Responsibility:*

a. Responsibility for the release of reports of boards of officers, special accident reports, or extracts therefrom regarding aircraft accidents to persons outside the authorized chain of command or administration will rest solely with the Secretary of the Air Force.

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IN THE

Supreme Court of the United States

October Term, 1952.

No. 21.

UNITED STATES OF AMERICA,
Petitioner,

v.

PATRICIA J. REYNOLDS, PHYLLIS BRAUNER, and ELIZABETH PALYA.

BRIEF FOR RESPONDENTS.

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BRIEF FOR RESPONDENTS.

OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania (R. 17-21) is reported at 10 F. R. D. 468. The opinion of the Court of Appeals for the Third Circuit (R. 44-58) is reported at 192 F. 2d 987.

JURISDICTION.

The judgments of the Court of Appeals were entered on December 11, 1951 (R. 59-60). The petition for a writ of certiorari was filed on March 7, 1952, and granted on April 7, 1952. 343 U. S. 918. The jurisdiction of this Court rests upon 28 U. S. C. 1254(1).

SUMMARY OF ARGUMENT.

1. It is admitted that the United States, by the passage of the Federal Tort Claims Act, having waived its exemption from claims for damages, shall be liable just as "a private individual under like circumstances" and shall be subject to the Federal Rules of Civil Procedure, including their provisions as to discovery. If, therefore, in a suit against the United States for the recovery of damages arising out of an airplane accident in which the Respondents' decedents were killed, the Secretary for Air, upon being ordered by the District Court under Federal Rule 34 to produce certain documents, chooses to assert a claim of privilege upon the ground that to disclose the requested documents would be contrary to the best interests of the Air Force, he must show the documents to the Court or at least give to the Court sufficient information to enable it to judge whether or not the documents contain anything which it would be contrary to the national security or the public

interest to disclose, in order that the Court may delete any such information. The claim of privilege is a justiciable question for the Court and the Secretary for Air may not successfully assert that he alone shall be the judge of whether his own claim is well founded. This is especially true where there is no showing that the documents in question contain any military secret and the claim is based merely upon the assertion that in the opinion of the Secretary it would be for the best interests of the management and morale of the Air Force that the documents should be kept secret.

2. The United States having refused to comply with the order of the District Court to produce under Federal Rule 34, the Court had power under Rule 37(b)(2) to direct that the Respondents need produce no further proof of the negligence of the United States and that the United States should not be permitted to introduce evidence to controvert the fact that the Respondents' decedents were killed as the result of its negligence.

3. The Respondents, upon showing that they were wholly without knowledge or means of knowledge of the cause of the crash of an airplane owned and operated by the Government, thereby showed good cause under Federal Rule 34 for the production prior to trial, of the Air Force investigation report and of the statements, taken by the Air Force immediately following the accident, of the only three surviving members of the plane crew.

ARGUMENT.

The argument in the Government's brief begins (p. 15) by saying that these cases present the question of whether the Courts can, in the course of litigation, compel disclosure of documents in the possession of Governmental departments which the officials in charge of them believe it is in the public interest to withhold. This statement is inaccurate and misleading.

Upon the contrary, the basic question here involved is whether those in charge of the various departments of the Government may refuse to produce documents properly demanded under the Federal Rules of Civil Procedure, in a case in which the Government is a party, simply because the officials themselves think it would be better to keep them secret, and this without the Courts having any power to question the propriety of such decision and without thereby subjecting the United States to the procedural disadvantages provided by the Rules in cases of such refusal. The position of the Government is that anything that any of its departments sees fit to declare shall not be disclosed, shall be beyond the reach of the discovery provisions of the Federal Rules and that the department heads alone shall be the judges of what they will disclose. In other words, say the officials, we will tell you only what *we* think it is in the public interest that you should know. And, furthermore, in so deciding we may withhold information not only about military or diplomatic secrets, but we may also suppress documents which concern merely the operation of the particular department if we believe that it would be best, for purposes of efficiency or morale, that no one outside of the department, not even the Court, should see them.

There can be no question that this is the heart of the Government's case. Its counsel so state in their brief (p. 47) where they say:

> "Our central position is that the power of determination is the Secretary's alone."

Should this contention be sustained, clearly it would be the end of any efficient discovery in any case in which the United States was involved.

In the brief for the Petitioner a great deal of confusion is created, in attempting to find support for the Government's position, by mixing together a number of different principles each of which, though sound in the abstract, is wholly inapplicable to the present cases. For example, it is said that the United States statutes give to the heads of departments the right to make rules for the government *of their departments;* that there is a privilege against the disclosure of important diplomatic or military secrets; that Federal Rule 34 itself contains an exception with respect to privileged documents. No one questions that these statements are correct in themselves but, when added together, they are certainly no authority for the proposition that the Secretary for Air shall have the uncontrolled discretion to refuse a departmental report in toto, not only without any attempt to show that it contains military secrets, but where, as here, the actual proof contained in the interrogatories and the answers thereto showed that the information requested had nothing to do with any military secret.

We could rest the Respondents' cases with confidence on the clear and well documented opinion of Judge Maris of the Circuit Court. We can add little to his exposition of the principles upon which these cases turn. With this as a foundation, therefore, we shall consider these principles as they bear upon the various contentions put forward in the Petitioner's brief.

I. There Is No General Privilege Preventing Discovery of Air Force Accident Reports.

We are glad to note that the Petitioner now concedes not only that under the Federal Tort Claims Act (28 U. S. C. 1346, 2674. Section 410), "the United States shall be liable . . . in the same manner and to the same extent as a

private individual under like circumstances" but also that, as this Court held in *United States v. Yellow Cab Company*, 71 S. Ct. 399; 340 U. S. 543 (1951), the Federal Rules of Civil Procedure apply to all suits under the Tort Claims Act. Further, that the Rules are intended to make the discovery procedure under Rules 26 to 37 applicable to the United States (Petitioner's brief pp. 55-57). This being so, what is the basis for the contention that Rule 34, authorizing orders for the production of documents, and Rule 37(b)(2), covering penalties for failure to comply with such orders, should not apply to the Government?

There has been no case in which it has been decided that the Executive is entitled to the privilege claimed by the Secretary for Air in the instant cases. As we shall see, there have been several cases deciding the contrary, although the question has not heretofore been squarely before this Court.[1] Petitioner, however, cites a number of

1. It was pointed out specifically by Mr. Justice Reed, in the Opinion, and by Mr. Justice Frankfurter in his concurring Opinion, in *Touhy v. Ragen*, 340 U. S. 462, 71 S. Ct. 416 (1951); that this Court was not passing (and had not passed) on the question of whether the head of an executive department could "shut off an appropriate judicial demand" for papers in his custody. The Opinion of the Court states, at 71 S. Ct. 419:

> "We find it unnecessary, however, to consider the ultimate reach of the authority of the Attorney General to refuse to produce at a court's order the government papers in his possession, for the case as we understand it raises no question as to the power of the Attorney General himself to make such a refusal. The Attorney General was not before the trial court. It is true that his subordinate, Mr. McSwain, acted in accordance with the Attorney General's instructions and a department order. But we limit our examination to what this record shows, to wit, a refusal by a subordinate of the Department of Justice to submit papers to the court in response to its subpoena *duces tecum* on the ground that the subordinate is prohibited from

instances in which Congress requested various papers and, upon being refused, dropped the matter without carrying it further. This certainly is slim authority for saying that an Executive privilege existed and *it is none at all for saying that had Congress insisted, the Executive would have been held by the Courts to be the only one entitled to pass upon his own claim of privilege.* The cited instances bear little resemblance to the present case. Most of the demands were made for political reasons. Most of them were made on the President, which explains why they went no further, for although Congress can impeach the President, he cannot as a practical matter be hailed into Court.

Before going further, let us pause for a moment to see exactly what kind of information it was that was requested in these cases. No one doubts that there is at least a qualified privilege in the case of some highly important military and diplomatic secrets. Perhaps some secrets might be imagined of so vital a character, as for example the plans of the atomic bomb, that not even the Judge should be allowed to see them. On the other hand, some representatives of the Government must hold the secret and there is certainly no reason why the members of the Federal Judiciary should not be considered as trustworthy as the representatives of any other branch of the Government. But be that as it may, it is self-evident that before any privilege can be sustained based on an important military secret, there must at least be some specific showing that the disclosure of such a secret is involved.

In the cases at Bar all that was asked was the Air Force investigation report of the accident and the statements of the surviving members of the crew, *in each case*

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making such submission by his superior through Order No. 3229. The validity of the superior's action is in issue only insofar as we must determine whether the Attorney General can validly withdraw from his subordinates the power to release department papers . . . ."

as to the cause of the accident only. It has never been claimed that the secret electronic equipment that was being tested on this particular plane had anything to do with the accident. In fact, the proof is to the contrary. In the answers to the interrogatories the only indication of the cause of the accident is that one of the aircraft's engines caught fire and the plane went into a spin (R. 12). In fact, had the Air Force been frank in its answers to Respondents' interrogatories as to the cause of the accident, it might never have been necessary to ask for the investigation report or the statements of the witnesses. The Air Force had the report and it knew the answer. Indeed, the offer of the Air Force (R. 27) to make the surviving members of the crew available so that the Respondents could take their depositions, would seem to be a fair indication that no important military secret was involved *as an effective cause of the accident.*

The Secretary's formal claim of privilege said that the plane at the time was engaged in a secret mission and that it carried confidential equipment (R. 22), but nowhere was it asserted that either had anything to do with the accident. The whole purpose of the demand by the Respondents was for the purpose of finding out what caused the accident in order to establish liability and for that purpose only. They were not in the least interested in the secret mission or equipment. If privilege is claimed on the ground that to comply with the order would result in the disclosure of a military secret, it is too plain for argument that the claim must so assert. Despite the fact that there was no such claim made in the present cases, Judge Kirkpatrick of the District Court amended his original order and directed the Air Force to first submit its report and the statements of the witnesses to him, so that anything confidential could be removed before they were shown to counsel for the Respondents (R. 28). But still the Air Force refused.

That Judge Kirkpatrick's order was the correct procedure is made clear by the language of the Supreme Court

in *Touhy v. Ragen*, 340 U. S. 462, 71 S. Ct. 416 (1951). As quoted in footnote No. 1 in the report of that case, the Attorney General of the United States in the Regulations which he had issued regarding the production of certain files, such as those of the F. B. I., which he regarded as confidential, himself recognized that the proper procedure is to make the Claim of Privilege and then submit the matter to the Court for decision. This, of course, means not merely making the bald claim of privilege, but showing to the Court why it should be granted. Order No. 3229 of the Department of Justice reads in part (340 U. S. 464; 71 S. Ct. 417; Fed. Reg. 4920):

> ". . . If questioned, the officer or employee should state that the material is at hand and can be submitted to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed. The records should be kept in the United States Attorney's office or some similar place of safe-keeping near the court room."

In commenting upon this, this Court said (340 U. S. 468; 71 S. Ct. 419):

> "We think that Order No. 3229 is valid and that Mr. McSwain in this case properly refused to produce these papers. We agree with the conclusion of the Court of Appeals that since Mr. McSwain was not questioned on his willingness to submit the material 'to the court for determination as to its materiality to the case' and whether it should be disclosed, the issue of how far the Attorney General could or did waive any claimed privilege against disclosure is not material in this case.

Department of Justice Order No. 3229, note 1, supra, was promulgated under the authority of 5 U. S. C. § 22. That statute appears in its present form in Revised Statutes § 161, and consolidates several older

statutes relating to individual departments. See, e.g., 16 Stat. 163. When one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness, indeed the necessity, of centralizing determination as to whether subpoenas duces tecum will be willingly obeyed *or challenged* is obvious." (Emphasis supplied.)

In other words, the function of the Department head when he considers that requested information should not be disclosed, is to "*challenge*" the demand in order that the question of privilege may be decided *by the Court.*

Even should we assume that there may be some information so confidential that not even a Federal Judge may be permitted to see it, at least the burden is upon the Government to explain to the Judge the nature of such information and to offer to supply the non-secret portion. In these cases all that the Air Force had to do was to say to Judge Kirkpatrick, if such was the fact, that its report gave the details of a secret weapon which it did not feel justified in showing to anyone. If it had done this, the Judge would undoubtedly have told them to take that part out and give him the rest. Instead of this, the Air Force refused flatly to show any of the requested documents to anyone. Its sole reason, as the Government now concedes, is that the Secretary feels that it is better for the morale and "housekeeping" arrangements of the Air Force that its reports shall be confidential and consequently that the Courts and everyone else must accept his judgment. "Our central position is that the power of determination is the Secretary's alone." (Petitioner's brief p. 47). On this, therefore, their case must stand or fall.

Judge Kirkpatrick summarized his reasons for denying the Claim of Privilege, as follows (R. 20, 21):

"Again, as in the Alltmont case, supra, the Government does not here contend that this is a case in-

volving the well recognized common law privilege protecting state secrets or facts which might seriously harm the Government in its diplomatic relations, military operations or measures for national security.

In effect, the Government claims a new kind of privilege. Its position is that the proceedings of boards of investigation of the armed services should be privileged, in order to allow the free and unhampered self-criticism within the service necessary to obtain maximum efficiency, fix responsibility and maintain proper discipline. I can find no recognition in the law of the existence of such a privilege. Substantially, this same claim has been considered and rejected in at least two District Court cases, Bank Line Limited v. United States, 68 F. Supp. 587, 76 F. Supp. 801, and Cresmer v. United States 9 F. R. D. 203. The first of these cases was under the Suits in Admiralty Act and the second under the Tort Claims Act, but the privilege claimed was the same in both. I agree with the results of these decisions and conclude that the report and findings in this case are not privileged."

The reason why a mere blanket claim of privilege by the Air Force cannot be sustained, if we are to conform to the American system of government, is well stated by the Court of Appeals for the District of Columbia in the case of *Land v. Dollar Line,* 190 F. (2) 623 (1951). In that case the Secretary of Commerce was held in contempt for refusing to obey a Court order to return the Steamship Company's stock certificates to the owners. The Court said (pp. 638, 639):

"The matter reaches to bedrock. The initial premise of the American form of government is that the rights of life, liberty and property are inherent in the people. The Government was established by the people, and its powers were enumerated in a written document. The Government has no other powers. In

order that neither the legislature nor the executive might exceed those conferred powers, a third, co-equal branch of government was established. It was not necessary to make the judiciary a co-equal branch of government in order to provide a tribunal for the adjudication of ordinary disputes between citizens; in almost all governments there are courts for that purpose. But it was necessary to make it such a third branch in order that there might be a tribunal with power to determine whether specific acts of the legislature or of the executive are within the powers conferred by the people in the written document.

It is absolutely true that if an act be within the powers conferred upon the legislature the judiciary cannot interfere with it in any fashion; and, similarly, if an act be within the power of the executive the judiciary cannot coerce it, restrain it, or interfere with it in any degree. *But some authority must determine whether a specific act is within the official capacity of the executive and so immune from interference. That authority is the judiciary.* That question is a justiciable issue. The Constitution put the power of determination of such a question in the judiciary, because it was necessary to put it there. It being necessary in the scheme of a constitutional government to have an authority to decide such a question, the authority to be effective had to be lodged in a separate independent branch of the government co-equal with the branches over whose activities it was to have this power.

(The officials) say that, even though the courts determine that a specific action is not within the official capacity of an executive officer, he is immune from compulsion by the courts in respect to that action. That is to say that the executive can determine for himself whether the acts of his subordinate officials are within or without their official capacities. That

proposition asserts the impotency of the judiciary as an organ of government." (Emphasis supplied.)

The exact question involved in the present cases was resolved in favor of plaintiff in the case of *Cresmer v. United States*, 9 F. R. D. 203 (U. S. D. C., E. D. N. Y., 1949). In that case the plaintiff's intestate had been killed in the crash of a Navy plane, and an action for wrongful death was brought against the United States under the Federal Tort Claims Act. The plaintiff, proceeding under Rule 34 (as in the instant cases) filed a motion for an order directing the United States to produce for inspection and copying the report of the Navy Board of Investigation into the flight and crash which were the subject of the action. The motion was opposed, as here, on the ground that the report was privileged. The court, after considering the problem with great care, made a preliminary examination of the report to make sure that it contained no vital secrets, and then ordered its production, District Judge Galston stating, at page 204:

"The motion is opposed on the ground that the report is privileged. On the argument of the motion I said from the Bench that the Federal Tort Claims Act places the United States in respect to claims dealt with by the Act on a par with private litigants. So it was held in Wunderly et al. v. United States, 8 F. R. D. 356. However, to make sure that the report in question contained no military or service secrets which would be detrimental to the interests of the armed forces of the United States or to the National security, I requested counsel to produce the report for my examination. I have read it and I see nothing in it which would in any way reveal a military secret or subject the United States and its armed forces to any peril by reason of complete revelation.

* * *

> *In the absence of a showing of a war secret, or secret in respect to munitions of war, or any secret appliance used by the armed forces, or any threat to the National security,* it would appear to be unseemly for the Government to thwart the efforts of a plaintiff in a case such as this to learn as much as possible concerning the cause of the disaster." (Emphasis supplied.)

The case of *Wunderly v. U. S.* referred to in the above quotation was decided by Judge McGranery on the authority of Judge Kirkpatrick's decision in *O'Neill v. U. S.*, 79 F. Supp. 827 (1948) discussed *infra* at page 32.

Essentially the same problem was presented in *Bank Line, Ltd. v. United States*, 68 F. Supp. 587 (U. S. D. C., S. D. N. Y., 1946); 163 F. (2) 133 (U. S. C. A. 2). (See also supplemental opinion of the District Court in 76 F. Supp. 801.) That case involved a collision between plaintiff's vessel and a vessel owned by the United States. The libellant, proceeding under Admiralty Rule 32, which is substantially the same as Rule 34 of the Federal Rules of Civil Procedure, moved in the District Court for an order to produce for inspection and copying a transcript of the hearing before the Naval Board relating to the collision. The situation in the *Bank Line* case was identical with that in the cases at Bar with the exception that it involved the Navy instead of the Air Force. In the *Bank Line* case the Navy objected, just as the Air Force did here, to the granting of the Motion for the production of the report of its investigation on the ground that it had been held solely for naval purposes and because of the need for disciplinary action. It submitted in support of its claim of privilege a written statement by the Judge Advocate of the Navy asserting that the record of the Board of Investigation was privileged. This was supplemented by a communication from the Secretary of the Navy saying that the Department "is of the view that an inability to conduct an investigatory

proceeding into its own administration, without the record becoming available to litigants, if the matter should become involved in litigation, will greatly hamper the effective functioning of the Navy Department and is prejudicial to its best interests." Hence, said the Secretary of the Navy, he considered the compulsory production of records of naval investigations not in the public interests. All of this is exactly the position of the Secretary for Air in the present cases. The Court, nevertheless, made an order granting the motion, except for such portions of the report before the Naval Board as dealt only with disciplinary action. The United States thereupon filed a petition in the Court of Appeals for a writ of prohibition against the District Court from taking steps to enforce its order to produce the report of the naval investigation. The Court of Appeals denied the Government's petition and stated that in making a claim of privilege it is for the Government to show why the information requested should be privileged. Judge Clark in his concurring opinion said (p. 139):

> "Second, I think we should avoid any implication of a suggestion that the Navy has, as yet, shown fully adequate grounds for refusing discovery. Certainly for the conduct of war and for purposes of national defense the proper heads of our armed forces may make a decision of the need of concealment, which the courts must respect; but I think no general principle of refusing discovery on a general statement of prejudice to its best interests can or should be applied to any branch of the government, including the armed forces. Here we are dealing with matters of a war now closed, i.e., with matters of history; could the Navy refuse information in its files as to the development of the Monitor on a present claim of privilege? We are not at war now, and I do not believe it will aid and comfort some unknown potential enemy if the Navy now states why concealment of specific information is material to national defense."

Although a B-29 airplane is of more recent vintage than the Monitor, it is nonetheless a type of aircraft which has been many times declared by our military leaders to be obsolete. It is a well-known fact that several of them were obtained intact by the Soviet Government during World War II and never returned to the United States. In fact, a present-day Russian heavy bomber is a copy of the B-29. If the Secretary for Air is of the opinion that there really is anything still secret about the construction or operation of a B-29 which it would not be in the public interest to disclose, he certainly should at least be required to give to the Court the benefit of his reasons for so thinking.

The same rule was applied in *United States v. Cotton Valley Operators Committee*, 9 F. R. D. 719 (U. S. D. C., W. D. La., 1949), where the court held that the United States cannot determine for itself, in a civil action under the anti-trust laws, whether or not certain documents in its possession, including F. B. I. reports, are privileged. From the following quotation from the opinion it will be seen that the way in which the question arose and the action of the Court were the same as in the cases at Bar except that in the *Cotton Valley* case, the United States was the plaintiff. Chief Judge Dawkins of the District Court of Louisiana said (p. 720):

> ". . . counsel for the Government appeared and submitted further authorities as to the right of the Attorney General to claim and for himself determine the question of privilege as to the documents called for in the motions to produce. Thereupon, after considering said cases, the court stated from the Bench that to sustain this contention, would in effect, amount to an abdication of the court's duty to decide the matter and leave it entirely in the hands of the Attorney General; that if the documents were submitted to the court, with such claims as to privilege as the Attorney General desired to make, they would be considered before

allowing opposing counsel to see them and if it appeared, in the court's judgment, that production of any part thereof would be injurious to public interest, they would be excluded; otherwise, the order to produce for the inspection of defendants would be sustained. This, having been declined, counsel was told that a reasonable time would be allowed for further consideration, and the latter, stating no additional time was desired, the court announced that the only course left was to dismiss the complaint for failure to comply with its orders. . . . "

On appeal to this Court, the decision was affirmed per curiam by a divided Court. See 339 U. S. 941, 70 S. Ct. 793 (1950).

What Judge Kirkpatrick said in *O'Neill v. U. S.*, 79 F. Supp. 827 (1948) is equally appropriate when applied to the instant cases (p. 830):

". . . Certainly the right accorded to seamen to sue the government by the Suits in Admiralty Act would be of very little value if the government could in its character as sovereign refuse to comply with any order of the Court in procedural matters without incurring any penalty or disadvantages."

There is a full discussion of the subject in *Wigmore on Evidence*, 3rd Ed., Vol. VIII, Section 2367, et seq. Wigmore recognizes the need for secrecy in certain cases involving diplomatic and military secrets, but beyond this he feels strongly that there is no such need. He says (§ 2378a, pp. 789-790):

"The question is then reduced to this. Whether there are any matters of fact, in the possession of officials, concerning *solely the internal affairs of public business*, civil or military which ought to be privileged from disclosure when material to be ascertained upon an issue in a court of justice?

1. Ordinarily, there are not. In any community under a system of representative government and removable officials, there can be no facts which require to be kept secret with that solidity which defies even the inquiries of a court of justice. 'To cover with the veil of secrecy,' said Patrick Henry, 'the common routine of business, is an abomination in the eyes of every intelligent man and every friend to his country.' Such a secrecy can seldom be legitimately desired. It is generally desired for the purposes of partisan politics or personal self-interest or bureaucratic routine. The responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption. Whether it is the relations of the Treasury to the Stock Exchange, or the dealings of the Interior Department with public lands, the facts must constitutionally be demandable, sooner or later, on the floor of Congress. To concede to them a sacrosanct secrecy in a court of justice is to attribute to them a character which for other purposes is never maintained,—a character which appears to have been advanced only when it happens to have served some undisclosed interest to obstruct investigation into facts which might reveal a liability.

2. It is urged, to be sure (as in Beatson v. Skene), that the 'public interest must be considered paramount to the individual interest of a suitor in a court of justice.' As if the public interest were not involved in the administration of justice! As if the denial of justice to a single suitor were not as much a public injury as is the disclosure of any official record! When justice is at stake, the appeal to the necessities of the public interest on the other side is of no superior weight. 'Necessity,' as Joshua Evans said, 'is always a suspicious argument, and never wanting to the worst of causes.'

* * *

> . . . After guaranteeing to official communications and acts an immunity from liability to civil or criminal consequences, and after further eliminating those acts and communications which are in no sense secret from their inception, what remains of real and intrinsic secrecy of transaction? If there arises at any time a genuine instance of such otherwise inviolate secrecy, let the necessity of maintaining it be determined upon its merits. But the solemn invocation, in the precedents above chronicled, of a supposed inherent secrecy in all official acts and records, has commonly been only a canting appeal to a fiction. It seems to lend itself naturally to mere sham and evasion."

To the same effect, see *Moore's Federal Practice*, 2nd Ed., Vol. 4, pp. 1180-1182.

Judge Maris characterized the Government's position as follows (R. 53):

> "Moreover we regard the recognition of such a sweeping privilege against any disclosure of the internal operations of the executive departments of the Government as contrary to a sound public policy. The present cases themselves indicate the breadth of the claim of immunity from disclosure which one government department head has already made. It is but a small step to assert a privilege against any disclosure of records merely because they might prove embarrassing to government officers. Indeed it requires no great flight of imagination to realize that if the Government's contentions in these cases were affirmed the privilege against disclosure might gradually be enlarged by executive determinations until, as is the case in some nations today, it embraced the whole range of governmental activities."

Even should we assume again, as the Petitioner does without benefit of authority, that at one time there may have been some sort of a common law special privilege in

the Government which was not possessed by private individuals, why talk about what the common law used to be when we now have a statute changing it? Clearly Congress had the right to pass a law doing away with any such special privilege, just as it had the right to do away with the Government's immunity from suit, and when the Chief Executive approved such a law, that ended the privilege both for himself and all minor executives. This Court has held that the Federal Tort Claims Act means what it says when it provides that the United States shall be liable "in the same manner and to the same extent as a private individual under like circumstances." In *United States v. Yellow Cab Company*, 71 S. Ct. 399; 340 U. S. 543 (1951), the question was whether the Government, having consented to be sued in tort, had agreed not only that it might be sued directly, but also that it might be brought in as a joint tort-feasor under the practice set up in the Federal Rules. This Court, speaking through Mr. Justice Burton, said (71 S. Ct. 403):

> "On its face the Act amply covers such consent. Section 410(a) waives immunity from suit on—'*any claim* against the United States, for money only, accruing on and after January 1, 1945, *on account of* damage to or loss of property or *on account of* personal injury or death *caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred.* Subject to the provisions of this title, *the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances,* except that the United States shall not be liable for interest prior to judgment, or for punitive damages,

• • •" (Emphasis supplied [by the Court].) 60 Stat. 844, 28 U. S. C. (1946 ed.) § 931(a).

The words *'any claim* against the United States • • • *on account of* personal injury' (emphasis supplied [by the Court]) are broad words in common usage. They are not words of art.

• • •

(p. 404)

It suggests no reason for reading into it fine distinctions between various types of such claims.

• • •

Recognizing such a clearly defined breadth of purpose for the bill as a whole, and the general trend toward increasing the scope of the waiver by the United States of its sovereign immunity from suit, it is inconsistent to whittle it down by refinements.[8]"

• • •

(p. 406)

This brings the instant cases within the principle approved in United States v. Aetna Casualty & Surety Co., 338 U. S. 366, 383, 70 S. Ct. 207, 216:

'In argument before a number of District Courts and Courts of Appeals, the Government relied upon the doctrine that statutes waiving sovereign immunity must be strictly construed. We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in Anderson v. John L. Hayes Construction Co., 243 N. Y. 140, 147, 153 N. E. 28, 29-30: "The exemption of the sovereign from suit involves hardship enough, where consent has been withheld. We are not to add to its rigor by refinement of construction, where consent has been announced."'

• • •

8. ". . . The District Court procedure is expressly made subject to the Federal Rules of Civil Procedure, 28 U. S. C. A., rather than to the Tucker Act."

> . . . As applied to the State of New York, Judge Cardozo said in language which is apt here: 'No sensible reason can be imagined why the state, having consented to be sued, should thus paralyze the remedy.' Anderson v. John L. Hayes Const. Co., 243 N. Y. at page 147, 153 N. E. at page 29. 'A sense of justice has brought a progressive relaxation by legislative enactments of the rigor of the immunity rule. As representative governments attempt to ameliorate inequalities as necessities will permit, prerogatives of the government yield to the needs of the citizen. • • • When authority is given, it is liberally construed.' United States v. Shaw, 309 U. S. 495, 501, 60 S. Ct. 659, 661, 84 L. Ed. 888."

It is indeed a hollow gesture for the United States to waive its immunity from suit, if it may then suppress the evidence necessary for the proof of the plaintiff's case. To permit such a result would be analogous to allowing the Government, where it is the prosecutor in a criminal case, to withhold under a claim of privilege evidence material to the proof of the defendant's innocence. For many years the Courts have held that in such criminal cases the Government has the choice of either waiving its privilege or letting the alleged offense go unpunished.[2] Similarly, in the instant cases, since the United States has seen fit to close the door to the plaintiffs' sole source of information as to the cause of the accident, it is only just that it should not be permitted to itself introduce evidence to controvert the fact of its own negligence.

It is clear that any power claimed for the Executive Branch of the Government must be based upon an Act of Congress or a provision of the United States Constitution. This premise and the nature of the power of the executive

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2. See *United States v. Andolschek*, 142 F. (2) 503 (1944) (C. A. 2); *United States v. Beckman*, 155 F. (2) 580 (1946) (C. A. 2).

was made clear by this Court in its very recent decision—*Youngstown Company v. Sawyer*, 72 S. Ct. 863 (1952). In that case this Court flatly rejected the claim that the President of the United States had inherent power and authority to seize and operate private steel mills, stating at 72 S. Ct. 866:

> "The President's power to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied . . ."

In the instant case Petitioners have not cited any act of Congress or Constitutional provision giving the Secretary for Air the authority claimed for him.

It is no answer to say that that R. S. 161, 5 U. S. C. 22 authorizes the head of each executive department to prescribe regulations for its clerks, the performance of its business and the use of its records, etc. and consequently, since the Secretary for Air has promulgated Air Force regulations prohibiting the disclosure of records without his approval, no one is entitled to see an Air Force record unless the Secretary permits. It is only necessary to read R. S. 161 (quoted on p. 75 of Petitioner's brief) to see that all it purports to do is to give to the various executive heads authority to make rules for the running of their respective departments, just as any State or corporate official must have authority to establish rules for the operation of the division of which he is in charge, if it is to operate efficiently. Obviously, such authority cannot be stretched so as to include the right of the department head to make rules affecting others outside of his organization and then elect himself the sole judge of their enforcibility. R. S. 161 itself says that the head of each department is authorized to prescribe regulations "*not inconsistent with the law.*"

Authorities Relied Upon by the Petitioner.

Petitioner relies upon the cases of *Boske v. Comingore*, 177 U. S. 459 (1900) and *Touhy v. Ragen*, 340 U. S. 462, 71 S. Ct. 416 (1951). One distinction between the *Boske* case and the instant case which is of importance is that in the former the Government was not a party to the litigation so that it had not agreed that a suit might be brought against it as though it were a private litigant and that it should be subject to the Federal Rules. The *Touhy* case involved the right of a subordinate official of the Department of Justice to refuse to obey a subpoena duces tecum ordering the production of certain papers of the Department in his possession. The basis of the refusal was a Regulation issued by the Attorney General under Revised Statutes 161, 5 U. S. C. § 22, just as in the cases at Bar the refusal of the Secretary for Air is based upon Regulations issued by him under the same authority. The subordinate official in the *Touhy* case was found guilty of contempt by the District Court. The Court of Appeals for the 7th Circuit reversed upon the ground that the subordinate was asked to make an unlimited disclosure which the Attorney General had forbidden without a prior determination by the Court of whether such disclosure was in the public interest. The Supreme Court affirmed purely on the ground that the Attorney General could forbid disclosure *by a subordinate* and hence the subordinate could not be held in contempt for merely doing what he was told by his superior. Both Justice Reed, who wrote the opinion, and Justice Frankfurter in his concurring opinion, expressly pointed out that the question of the extent of the Attorney General's privilege against disclosure was not at issue. Justice Frankfurter said (340 U. S. 471; 71 S. Ct. 421):

> "'This case,' the Court holds, 'is ruled' by Boske v. Comingore, 177 U. S. 459. I agree. Boske v. Comingore decided that the Secretary of the Treasury was authorized, as a matter of internal administration in

his Department, to require that his subordinates decline to produce Treasury records in their possession. In the case before us production of documents belonging to the Department of Justice was declined by virtue of an order of the Attorney General instructing his subordinates not to produce certain documents. The authority of the Attorney General to make such a regulation for the internal conduct of the Department of Justice is not less than the power of the Secretary of the Treasury to promulgate the order upheld in Boske v. Comingore, supra.

But in holding that that decision rules this, the context of the earlier decision and the qualifications which that context implies become important. The regulation in Boske v. Comingore provided: (1) that collectors should under no circumstances disclose tax reports or produce them in court, and (2) that reports could be obtained only 'on a rule of the court upon the Secretary of the Treasury.' 177 U. S. at 460-461. The regulation also stated that the reports would be disclosed by the Secretary of the Treasury 'unless it should be found that circumstances or conditions exist which makes it necessary to decline, in the interest of the public service, to furnish such a copy.' Ibid. *This portion of the regulation was not in issue, however, for the Court was considering the failure of the collector to produce, not the failure of the Secretary of the Treasury.* This is emphasized by the Government's suggestion that:

> 'If the reports themselves were to be used this could be secured by a subpoena duces tecum to the head of the Treasury Department, or someone under his direction, who would produce the original papers themselves in court for introduction as evidence in the trial of the cause.' Brief for Appellee, p. 49, Boske v. Comingore, supra.

And the decision was strictly confined to the narrow issue before the Court. It is epitomized in the concluding paragraph of the Boske opinion:

> 'In our opinion the Secretary, under the regulations as to the custody, use and preservation of the records, papers and property appertaining to the business of his Department, may take from a subordinate, such as a collector, all discretion as to permitting the records in his custody to be used for any other purpose than the collection of the revenue, and reserve for his own determination all matters of that character.' 177 U. S. at 470.

There is not a hint in the Boske opinion that the Government can shut off an appropriate judicial demand for such papers." (Emphasis supplied.)

Applied to the present cases this simply means that the Secretary for Air was entirely within his rights in promulgating a Regulation that accident reports should not be released without his approval, but that does not mean that he himself can refuse a proper judicial demand without proving to the satisfaction of the Court that the refusal is justified.

The Petitioner points to a number of historic instances in which different Presidents of the United States are said to have refused to produce certain information. The principal cases referred to are *Marbury v. Madison*, 1 Cranch 137 (1803) and *Burr's Trials*. *Marbury v. Madison* was an action of mandamus to require James Madison, as Secretary of State, to deliver to Marbury a commission as Justice of the Peace in the District of Columbia, which had been signed by President John Adams but which Marbury had never received. Obviously, there was no question at issue such as that in the present cases. In the course of the argument Attorney General Lincoln was called as a witness and the Supreme Court said that he should answer the questions asked but that he was not bound to disclose

anything which had been communicated to him in confidence. In other words, confidential matters such as those between attorney and client, physician and patient, etc. should be respected, as indeed Federal Rule 34 specifically provides for when it says that the Court may make an order for the production of documents, etc. "not privileged". What this Court in effect said in the *Marbury* case was that upon a showing by Mr. Lincoln to the Court that he had information which was confidential, *the Court* would not compel him to answer. This is certainly no authority for the proposition that even in that day, long before the Government had waived its immunity from suits for damages and had agreed that it might be treated in such cases exactly like a private individual, the head of a department could refuse to disclose even to the Court anything which he alone felt that the morale of his department required should be kept secret.

It is said (Petitioner's brief p. 32) that in *Burr's* trial Chief Justice Marshall issued a subpoena to President Jefferson for the production of a letter sent to him by John Wilkinson and that Jefferson ignored the subpoena. An examination of the report of the trial in 1 Robertson's Reports, shows that this is not the fact. Jefferson furnished all of the documents demanded except one letter from General Wilkinson and he left it to Government counsel to withhold "communication of any parts of the letter which are not directly material for the purposes of justice." (1 Robertson's Rep. p. 210). Government counsel emphasized that he was willing to disclose the entire letter to the Court and leave it to the Court to suppress so much as was not material to the case. It is implicit throughout Chief Justice Marshall's opinion in the *Burr* case that where such a claim of privilege is made, the reason should be shown to the Court, and he in fact asserted the power of the Judiciary to determine whether an executive claim of privilege had merit. For an up-to-date and most interesting discussion of this whole question, in-

cluding the historical background of Governmental claims of privilege, see the article in the December, 1950 issue of the Yale Law Journal entitled "Government Immunity from Discovery", *59 Yale L. J. 1451.*

Great stress is laid (Petitioner's brief pp. 38-42) upon the English case of *Duncan v. Cammell, Laird & Company, Ltd.*, 1942 A. C. 624. That case grew out of the sinking on her trial test of the new British submarine "Thetis", with heavy loss of life. The Crown was not a party to the litigation and discovery was sought of documents which included the plans and specifications of the vessel. Obviously, this was a case of military secrets, which have always been considered highly confidential and privileged. Although the opinion does say that an objection to the production of documents by the head of a Government department on the ground of public interest is conclusive, this was not necessary to the decision since the objection of the Admiralty in this case had been made subject to the order of the court. This appears from the opinion, where the House of Lords said (1942 A. C. at p. 642):

> "Although an objection validly taken to production, on the ground that this would be injurious to the public interest, is conclusive, it is important to remember that the decision ruling out such documents is the decision of the judge. Thus, in the present case, the objection raised in the respondents' affidavit is properly expressed to be an objection to produce 'except under the order of this honourable court.' It is the judge who is in control of the trial, not the executive, but the proper ruling for the judge to give is as above expressed."

Judge Maris' comment upon the *Duncan* case was (R. 56):

> ". . . For whatever may be true in Great Britain the Government of the United States is one of checks

and balances. One of the principal checks is furnished by the independent judiciary which the Constitution established. Neither the executive nor the legislative branch of the Government may constitutionally encroach upon the field which the Constitution has reserved for the judiciary by transferring to itself the power to decide justiciable questions which arise in cases or controversies submitted to the judicial branch for decision."

Another distinction between the British rule and that in the United States is that in England, although the Crown may be sued, there is no Tort Claims Act saying that the Government shall be liable under the same circumstances as a private individual, nor was there at the time of the *Duncan* case anything comparable to our Federal Rules. And it is interesting to note that when the Crown Proceedings Act, 1947, 10 & 11 Geo. 6, C. 44, § 28, was passed, for the first time expressly authorizing discovery against the Crown, it specifically exempted any document which *in the opinion of the Minister*, it would be injurious to the public interest to disclose.

The quotation from *Duncan v. Cammell, Laird & Company*, given in Note 23 on pp. 40-41 of Petitioner's brief, is interesting in that it shows clearly that even in England the ground upon which the Government's claim of privilege is based in the instant cases would not be recognized. As the Lord Chancellor said:

". . . Neither would it be a good ground that production might tend to expose a want of efficiency in the administration or tend to lay the department open to claims for compensation. In a word, it is not enough that the minister of the department does not want to have the documents produced."

Frequent reference is made to Air Force Regulation No. 62 (quoted on pp. 78 to 81 of Petitioner's brief), which provides that witnesses before an Air Force Investigation

Board shall be told that reports will not be used in connection with disciplinary action, determination of pecuniary liability, or line-of-duty status or reclassification.

The contention is that since the investigation is made upon an assurance given to the witnesses that it will not be used against them, disclosure would violate this promise, would hinder future investigations and break down the morale of the Air Force. The obvious meaning of the language of the Regulation to the effect that the report will not be used in any proceeding "toward disciplinary action, determination of pecuniary liability or line-of-duty status, or reclassification", is that it will not be so used *against the witnesses.* The purpose is to get at the true facts without having anything held back. To say that witnesses who are themselves immune, will not tell the truth just because their statements may show that the Government should compensate the relatives of persons who have been carelessly killed, is a complete non sequitur.

Petitioner's next contention (brief pp. 45, 46, 49 & 50) is that since Congress as far back as 1910 in the Interstate Commerce Act (36 Stat. 351, 45 U. S. C. 41) and again in 1938 in the Civil Aeronautics Act (52 Stat. 1012, 49 U. S. C. 581) provided that reports of investigations conducted by these bodies should not be admitted in evidence or used for any purpose in any suit for damages growing out of the matter investigated, therefore the failure to make a similar provision covering Air Force investigations must have been an oversight. As Judge Maris pointed out, the natural conclusion is exactly the reverse. He said (R. 52, 53):

> ". . . Where, as here, the United States has consented to be sued as a private person, whatever public interest there may be in avoiding any disclosure of accident reports in order to promote accident prevention must yield to what Congress evidently regarded as the greater public interest involved in seeing that justice is

done to persons injured by governmental operations whom it has authorized to enforce their claims by suit against the United States. When Congress has desired to bar the admission of airplane accident reports in evidence it has known how to do so, and it has also known how to give to department heads discretionary power to refuse to produce records in suits brought against the United States. It has done neither in connection with suits under the Federal Tort Claims Act."

II. The Power of the District Court to Enter Judgment.

In the Circuit Court the Government argued that the District Court, by its order that the plaintiffs need produce no further proof of the negligence of the defendant and that the United States should not be permitted to introduce evidence controverting the negligence, violated Rule 55(e) [3]

3. The draftsmen of the Federal Rules of Civil Procedure were careful to state in Rule 55(e) that judgment by default should not be entered against the United States, and also to make special provisions relating to the United States in other sections of the Rules, such as those providing the time for the filing of pleadings, etc. This shows clearly that in all cases in which it was intended that there should be a difference in the application of the Rules to the United States, as distinguished from a private individual, the draftsmen of the Rules were careful to specifically so provide. If it had been intended that the orders covered by Rule 34 should not apply to the Government, we could have consistently expected to find at the end of that Rule another sentence reading somewhat as follows:

"Provided, however, that no such order shall be made against the United States in any case in which it shall have filed a claim of privilege."

In any event, even if an actual judgment by default had been entered against the Government under Rule 55(e), it would have fallen within the exception in that Rule with respect to such judgments against the United States. The Rule says "No judgment by default shall be entered against the United States or an officer or agency thereof *unless the*

forbidding judgment by default against the United States. Although Petitioner's present brief is not entirely clear on this subject, we understand that it has now abandoned this contention. Nevertheless, it is argued that the District Court, by applying the sanctions under Rule 37(b)(2), has in some way circumvented Rule 55(e) against the entry of judgment by default against the United States.

The answer is that all that the District Court did was to enter an order exactly as provided in Rule 37(b)(2) which this Court has said in the *Yellow Cab* case, and Government counsel now admit, is applicable to the United States. The Secretary's alleged privilege was not violated by compelling him to produce the documents. He was simply subjected to the procedural limitations provided by the Rules for his failure to obey the Court's order, precisely, in the language of the Federal Tort Claims Act, "in the same manner and to the same extent as a private individual under like circumstances". Just as in the case of any other

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claimant establishes his claim or right to relief by evidence satisfactory to the Court.". In the present cases the Respondents' claims were established by evidence. As we have seen, under the pleadings and the answers to the interrogatories, it was admitted that the airplane was owned, operated and controlled exclusively by the United States. It was further admitted that an engine took fire and the plane went into a spin and crashed. The deaths having occurred in Georgia, the cases are governed by the law of that State, which is that where the instrumentality in question is shown to be under the management of the defendant or its servants and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, this in itself affords reasonable evidence of negligence. *Macon Coca-Cola Bottling Co. v. Crane*, 55 Ga. App. 573; 190 S. E. 879; *Chenall v. Palmer Brick Co.*, 117 Ga. 106, 43 S. E. 443 and 119 Ga. 837, 47 S. E. 329. It therefore follows that inasmuch as the record contained evidence of the negligence of the United States, the Trial Judge would not have been prevented by the provisions of Rule 55(e) from entering judgment by default.

litigant, the Secretary for Air had his choice whether to produce or to have one of its defenses taken away from the Petitioner as defendant in these cases. The Secretary made his choice and must abide the result.

This same question was passed upon by Judge Kirkpatrick in *O'Neill v. U. S.*, 79 F. Supp. 827 (1948). That case involved the plaintiff's demand for production of the statements of witnesses taken by the F. B. I. in connection with a suit by a seaman against the United States under the Suits in Admiralty Act, 46 U. S. C. A., Section 741, et seq., for injuries incurred on a Government vessel during World War II. The Court was applying Admiralty Rule 32(c), which is the counterpart of Rule 34 of the Federal Rules of Civil Procedure. The Attorney General of the United States objected to the production of the statements upon the ground of privilege. Because of the Government's failure to comply with its order to produce, the Court entered an order refusing to allow it to oppose the libellant's contention that his injury was due to negligence on the part of the personnel of the vessel in question. Judge Kirkpatrick said (p. 830):

> "Nor can it be said that the remedy asked for amounts to compulsion under another form. True, if the Attorney General refuses to make the disclosure the government will incur certain procedural disadvantages by way of penalty and may lose its case, but it is the government that is being sued, not the Attorney General, and the government has consented. When it enacted the Suits in Admiralty Act, Congress was in essence authorizing the payment out of the Treasury of money upon judgments obtained in such suits. It was entirely within the constitutional powers of Congress to set up any procedure it pleased by which a suitor in such case could obtain a judgment. It could have curtailed or eliminated defenses, or handicapped the government procedurally in any manner. Actually, it

went no further than to provide that certain omissions and defaults in the course of a suit would have the same effect in the case of the government as in the case of a private litigant.

* * *

In applying the sanctions by Rule 32C for refusal to make disclosure the Court has a wide discretion. The libellant in this case has asked for judgment by default. I do not think that in the present case this remedy is appropriate. Although Rule 55(e) of the Rules of Civil Procedure, providing that no default shall be entered against the United States unless the claim for relief is established by satisfactory evidence, does not apply to admiralty proceedings, I think the policy of the Rule is generally sound and is particularly applicable to a case like the present. I think that it would be proper to make an order refusing to allow the government in this case to oppose the libellant's claim that his injury was due to negligence on the part of the personnel of the Cedar Mills or the unseaworthiness of the vessel, or both."

The weakness of the Petitioner's position is illustrated by the fact that it is finally reduced to saying in effect (brief pp. 66-67), that even if it may be all right to force the Government to make its election whether to abide by the Rules or suffer the penalties which they provide in a case in which the Government is the claimant, it is highly improper to compel it to elect between disclosing or foregoing a defense where the action is brought against it. It is difficult to understand wherein lies the difference between an order which may result, on the one hand, in the Government's being unable to collect a claim, and upon the other, one which leads to a judgment against it. Certainly the "public interest" is the same in either case.

III. Respondents Showed "Good Cause" Under Rule 34.

The accident out of which these cases arose was the crash of an airplane owned, maintained and operated by the United States. Out of thirteen men on board, only four survived. One was a civilian engineer like the Respondents' decedents, who was on the plane only for the purpose of testing certain electronic devices which the Government does not claim had anything to do with the operation of the plane or the cause of the accident. This civilian survivor could therefore not be expected to have any expert knowledge of why the accident happened. The other three survivors were all Air Force personnel—Captain Moore, Co-Pilot, and Sergeants Peny and Murrhee (R. 12, 13). The Government concedes that it took written statements from each of these three men immediately following the accident and, further, that it conducted an investigation by a board of experts, who made a written report of their findings as to the cause of the accident. The answers to Interrogatories 1 and 5 so state and admit that the Air Force obtained statements as to the events leading up to the crash, the mechanical condition of the plane immediately prior thereto, and the cause of the accident (R. 7, 8, 9, 11, 12).

It is a well known fact that where an accident occurs to an Air Force plane, no one other than Government personnel is allowed access to the wreckage. And, in any event, by the time that the Respondents were able to employ counsel and make their demands for discovery, what little there was left of the plane had been removed and was unavailable.

We do not contend that it is not necessary under Rule 34 for the moving party to show "good cause" in order to be entitled to discovery. The Rule says so. What we do contend is that not only has "good cause" been shown, but that it is inherent in the very nature of the present cases.

It was alleged without contradiction that the Respondents had no knowledge of the cause of the accident and no way in which to obtain it other than from the Government

personnel on the plane and the report of the Air Force investigation (see paragraph 5 of plaintiffs' Motion for Production of Documents, R. 15, 16). How could the plaintiffs possibly know and how else could they find out? If there was ever a case in which a plaintiff had "good cause" for the production of documents, this is it.

The documents which the Petitioner refused to produce were of two kinds—one, the statements of the three surviving members of the crew of its plane, taken immediately after the accident, and, second, the report of its investigating Board of Experts. We understand that Government counsel do not now contend that "good cause" was not shown for the production of the latter inasmuch as they never offered to produce it in any form. Upon the contrary, the Petitioner seeks to justify its refusal as to the report solely upon the ground of privilege. Consequently, if the Court finds that the report was not privileged in the sense contended for by the Secretary, the question of "good cause" becomes moot, inasmuch as the District Court's order was justified in any event because of the refusal to produce the report.

The Petitioner contends that because it offered to produce the witnesses so that their depositions could be taken,[4]

4. Even this gesture was a qualified one. The affidavit of the Judge Advocate General says (R. 27) "That these witnesses will be authorized to testify regarding all matters pertaining to the cause of the accident *except as to facts and matters of a classified nature.*" (Emphasis supplied.) What does this exception mean? What is it that the Government is reserving the right to hold back? The Secretary for Air in his claim of privilege states (R. 22) that "any disclosure of its (the airplane's) mission or information concerning its operation or performance would be prejudicial to this Department and would not be in the public interest." In the light of this all-inclusive claim of privilege, it is obvious that the Air Force considers that all details concerning the operation of the airplane are "classified," and that the information, if any, obtained by deposition would have been no more substantial than that which

this made the written statements taken from these witnesses immediately after the accident unnecessary, thereby demonstrating that there was no "good cause" shown for the production of the statements.

In answer to this we cannot improve upon Judge Kirkpatrick's summary, in which he says (R. 19, 20):

> "However, assuming that it is possible to take the depositions of the witnesses in question without undue burden upon the plaintiffs, the fact remains that, in view of the nature of this particular case, disclosures of the contents of their written statements is necessary to enable the plaintiffs to properly prepare their cases for trial, and furnishes good cause for production.
>
> The plaintiffs have no knowledge of why the accident happened. So far as such knowledge is obtainable, the defendant has it. When the airplane crashed, it was wrecked and much of the evidence of what occurred was destroyed. Only persons with long experience in investigating airplane disasters could hope to get at the real cause of the accident under such circumstances. The Air Force appointed a board of investigators immediately after the accident and examined the surviving witnesses while their recollections were fresh. With their statements as a starting point the board was able to make an extensive investigation of the accident. These statements and the report of the board's investigation undoubtedly contain facts, information and clues which it might be extremely difficult, if not impossible, for the plaintiffs with their lack of technical resources to obtain merely by taking the depositions of the survivors.

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was obtained by the interrogatories under Rule 33. It is clear that had Respondents attempted to obtain an order from the court compelling further answers to interrogatories or depositions, the Government would have made a similar claim of privilege.

I am not suggesting that the witnesses on deposition would not answer the questions asked them truthfully but, in a case like this, in which seemingly trivial things may, to the expert, furnish important clues as to the cause of the accident, the plaintiffs must have accurate and precise first-hand information as to every relevant fact if they are to conduct their examination of witnesses properly and to get at the truth in preparing for trial. This only the statements can give them. I would not go so far as to say that the witnesses would necessarily be hostile. However, they are employees of the defendant, in military service and subject to military authority and it is not an unfair assumption that they will not be encouraged to disclose, voluntarily, any information which might fix responsibility upon the Air Force.

The answers to the interrogatories are far short of the full and complete disclosure of facts which the spirit of the rules requires. True, the defendant has produced a mass of documents but these refer to the past performance of the plane and service records of the pilots and are essentially negative. When it comes to the interrogatory 'Describe in detail the trouble experienced', the answer is, 'At between 18,500 or 19,000 feet manifold pressure dropped to 23 inches on No. 1 engine.' Obviously the defendant, with the report and findings of its official investigation in its possession, knows more about the accident than this.

Beside all this, the accident happened more than 18 months ago and what the crew would remember now might well differ in important matters from what they told their officers when the event was fresh in their minds. Even in simple accident cases requiring no technical knowledge to prepare for trial, the fact that a long period of time has elapsed between the accident and the taking of the deposition of a witness gives a

certain unique value to a statement given by him immediately after the accident when the whole thing was fresh—particularly when given to an employer before any damage suit involving negligence has begun."

It is argued that Rule 34 should not have been applied until after interrogatories, depositions and pre-trial conferences had been exhausted. We filed interrogatories and the answers very carefully avoided giving any real information about the cause of the accident. There were several conferences prior to the order under Rule 34 and they were equally barren of results. So far as depositions were concerned, with absolutely no knowledge of what caused the accident to start with, how else could counsel for the Respondents know how to examine intelligently the witnesses either at the trial or upon depositions, unless he could see their statements given immediately after the accident with no thought of litigation in mind, and unless he could also see the report of the Air Force Investigating Board. When an accident is long past, it is so easy for an unwilling witness, with no fear of a written statement to check him, to give the time-worn answer "I don't remember".

Furthermore, the Respondents had intended at the trial to call an aviation expert as a witness upon their behalf. Obviously, for such a witness to be useful it is essential that he should be put in possession in advance of trial of all the facts and technical details having to do with the accident.

There have not been many decisions on the narrow question of what constitutes a showing of "good cause", and even such as there are do not attempt to lay down a definite test. The reason, of course, is that each case must depend on its own facts and, as the Trial Judge pointed out in his opinion (R. 18): "Concededly, in determining what amounts to good cause under Rule 34, the trial court has a wide discretion."

In any case where the party seeking discovery shows a real need for discovery, the cases hold that good cause is established and discovery will be granted. Thus, in *Thomas v. Pennsylvania R. R. Co.*, Dist. Court, E. D. of N. Y., 7 F. R. D. 610 (1947), the Court ordered the defendant to produce written statements of its witnesses, where it appeared that the credibility of the witnesses would be of material importance at the trial. This was done even though the plaintiff had already taken their depositions.

In *Canister Co. v. National Can Corp.*, U. S. Dist. Court of Delaware, 8 F. R. D. 405 (1948), the Court held that good cause for production of documents was shown by defendant in the averment under oath that the writings might contain facts whereby defendant might be able to minimize the amount of plaintiff's alleged damages.

In *Lindsay v. Prince*, D. C., N. D. of Ohio, W. D., 8 F. R. D. 233, (1948), the Court held that good cause had been shown for the production of statements of witnesses where it was shown by affidavit that the moving party had been unable to obtain any information about the accident.

In *Electric Furnace Co. v. Fire Association of Phila.*, U. S. District Court, N. D. of Ohio, 10 F. R. D. 152 (1950), the Court ordered the production of all the reports containing the results of defendant's investigation, even though plaintiff had already obtained summaries of these reports by means of interrogatories. The Court pointed out that under the Rules the plaintiff is entitled to complete and exhaustive discovery, and stated (p. 153):

> "No case has been found which deals directly with the question here presented, but there are some cases which are closely analogous. In Bruun v. Hansen, D. C. 30 F. Supp. 602, it was held that the fact that the party seeking discovery of documents had learned of their contents by a bill of particulars did not prevent the discovery of the documents; and in Leach v. Grief Bros., D. C., 2 F. R. D. 444, it was held that the fact

that both parties had the information contained in the desired documents would not prevent their discovery, because if both side had the documents, lengthy cross-examination would be avoided, and perhaps some of the issues might be eliminated. The production of the reports in this case will have the same effect. If plaintiff can examine the documents, it may be it will decide that defendant had no independent knowledge of the loss sustained by plaintiff, and thus eliminate one issue entirely, and probably shorten cross-examination considerably.

Furthermore, use of one of the Rules such as 33, does not preclude use of all the others, such as 34. They are of course somewhat related but unless complete and exhaustive disclosure of every facet of information has been obtained by one of the rules, a party may choose to abandon one method of discovery and follow the procedure under another rule which he believes will afford greater disclosure of material facts. The rules are pretty broad where information is sought.

In this case plaintiff has by use of interrogatories discovered some very relevant information contained in certain reports. However revealing this information is, it still is an edited (no doubt carefully) summation of the reports by the defendant. Since the reports as shown by the answers to the interrogatories do contain information relevant to plaintiff's claim, it would seem that plaintiff ought not to be made to rely on defendant's interpretation of the reports but should be given an opportunity to view the reports in their entirety.

The case of Hickman v. Taylor, 329 U. S. 495, 67 S. Ct. 385, 91 L. Ed. 451, is not controlling here. In that case complete and exhaustive discovery had been had, which is not clearly evident in this action. Since plaintiff is entitled to the information, and since it is relevant to the issues of this action, and it cannot be

obtained except by use of this rule, it is my conclusion that good cause has been shown and the motion for discovery will be sustained."

CONCLUSION.

It is clear that there is no practical danger that the security of the country will be jeopardized by requiring the Secretary to consult the Trial Judge, personally if it be very important, or by one of his assistants if (as doubtless in the present case) it be less so. In such interview the Secretary can either convince the Judge that the documents are so vital to security that they must not be shown, even to the Judge, or the Judge, after looking at them, can decide what parts of them, if any, may not properly be shown to the other side. Should the Judge decide that items must be disclosed which the Secretary deems dangerous, he would certainly have the right to have the Circuit Court and this Court review such decision.

As Judge Maris of the Circuit Court put it (R. 56):

". . . Nor is there any danger to the public interest in submitting the question of privilege to the decision of the courts. The judges of the United States are public officers whose responsibility under the Constitution is just as great as that of the heads of the executive departments. When Government documents are submitted to them *in camera* under a claim of privilege the judges may be depended upon to protect with the greatest of care the public interest in preventing the disclosure of matters which may fairly be characterized as privileged."

If both the District Court and the Circuit Court and this Court are clear that no jeopardy to the national security will result from the disclosure ordered, we may be entirely sure that the position of the Government is based on its

natural, although arbitrary, desire to be in no way supervised or interfered with, irrespective of the rights of innocent parties. We may also perhaps be not far wrong in assuming what we believe to be the conclusion in the present case, that the Government has no sound defense on the merits, and that no injustice will result if the Government chooses, in order to avoid the objectionable disclosure, to be subjected to the procedural disadvantage here directed.

Respectfully submitted,

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